(9)

No. 89-994-CFX
Status: GRANTED

Title: West Virginia University Hospitals, Inc., Petitioner
v.
Robert Casey, Governor of Pennsylvania, et al.

Docketed:
December 22, 1989

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Adams,Robert T.

Counsel for respondent: Foerster,Jerome T.

Entry	Date	Note	Proceedings and Orders
1	Dec 22 1989	G	Petition for writ of certiorari filed.
2	Jan 24 1990		DISTRIBUTED. February 16, 1990
3	Jan 29 1990		Brief of respondents Governor Robert Casey, et al. in opposition filed.
4	Jan 31 1990	F	Response requested -- JPS.
5	Feb 7 1990		REDISTRIBUTED. February 23, 1990
6	Feb 26 1990		Petition GRANTED.
			**********
9	Mar 12 1990		Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
7	Apr 12 1990		Joint appendix filed.
8	Apr 12 1990		Brief of petitioner West Virginia University Hospitals, Inc. filed.
10	May 11 1990		Brief amicus curiae of Equal Employment Advisory Council filed.
11	May 14 1990		Brief of respondents Governor Robert Casey, et al. filed.
12	Jun 14 1990		Reply brief of petitioner West Virginia University Hospitals, Inc. filed.
13	Jul 2 1990		CIRCULATED.
14	Jul 23 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 9, 1990. (3RD CASE)
15	Sep 6 1990		Record filed.
		*	Certified copy of original record, 2 boxes, received.
16	Sep 13 1990		Record filed.
		*	Certified copy of 2 volumes of appendices, briefs and partial proceedings received. (Box).
17	Oct 9 1990		ARGUED.

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No. _____

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CLERK

IN THE

Supreme Court of the United States

October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

May an award of attorneys' fees under 42 U.S.C. § 1988 include compensation for expert witnesses?

RULE 28.1 LISTING

West Virginia University Hospitals, Inc., is a public corporation created by the West Virginia Legislature. See § 18-11c-2(d) of the Code of West Virginia. It has the following subsidiary (not wholly owned) and affiliate:

Subsidiary: HealthNet Insurance Company

Affiliate: Health, Education and Research Corporation

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No. ___

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, West Virginia University Hospitals, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on September 5, 1989.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 885 F.2d 11, and is included in the Appendix at A-1 to A-49. The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 701 F. Supp. 496, and is included in the Appendix at B-1 to B-68. An unpublished memorandum opinion of the District Court concerning an award of attorneys' fees is included in the Appendix at C-1 to C-4.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was issued on September 5, 1989. An order, denying petitioner's timely request for a rehearing, was issued by the United States Court of Appeals for the Third Circuit on October 5, 1989. The mandate of the United States Court of Appeals for the Third Circuit was issued on October 13, 1989.

The jurisdiction of this Court to issue a writ of certiorari in this case is based upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988.
Proceedings in vindication of civil rights; attorney's fees

> *The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "**CIVIL RIGHTS**," and of Title "**CRIMES**," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.*

STATEMENT OF THE CASE

West Virginia University Hospitals, Inc., (hereinafter referred to as "WVUH") operates a tertiary medical center in Morgantown, West Virginia, six miles south of the border between the Commonwealth of Pennsylvania and the State of West Virginia. 701 F. Supp. at 498-499 (Findings of Fact # 7, 14, and 15); Appendix at B-3 to B-4. As a consequence, WVUH is a significant provider of hospital services to Pennsylvania medicaid recipients living in southwestern Pennsylvania. 701 F. Supp. at 498-499 (Findings of Fact # 8-22); Appendix at B-3 to B-5.

In January, 1986, Pennsylvania's Department of Public Welfare notified WVUH of new medicaid payment rates for WVUH's hospital services to Pennsylvania medicaid recipients. Convinced that the new payment rates were contrary to the minimum standards for reimbursement specified in the Social Security Act, WVUH attempted to resolve the problem administratively. However, the Pennsylvania Department of Public Welfare informed WVUH that an administrative appeal,

based upon the methodological inadequacies of Pennsylvania's reimbursement system, would not lead to any relief. See 701 F. Supp. at 521; Appendix at B-56.

Consequently, in July, 1986, WVUH filed suit in the United States District Court for the Middle District of Pennsylvania. WVUH challenged the adequacy of Pennsylvania's payment system and the adequacy of Pennsylvania's medicaid administrative appeals system under federal law.[1] The jurisdiction of the district court was based upon 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and (4), and 28 U.S.C. § 1332. WVUH also sought remedies under 42 U.S.C. § 1983 and under 28 U.S.C. § 2201.

In May and June, 1988, the District Court conducted a six-day trial. At trial, WVUH depended upon the testimony of three expert witnesses who testified about the deficiencies in Pennsylvania's payment system for out-of-state hospitals like WVUH and the inadequacy of Pennsylvania's administrative appeals system. These experts were essential both at trial and during the pretrial preparation of the case between 1986 and 1988.

1 WVUH alleged four causes of action in its complaint:
(1) the inadequacy of the payment system under 42 U.S.C. § 1396a(a)(13)(A);
(2)the lack of any basis-in-fact for the assurances Pennsylvania officials provided the Federal Government about the payment system as required by 42 U.S.C. § 1396a(a)(13)(A);
(3)the inadequacy of the administrative appeals system under 42 U.S.C. § 1396a(a)(37) and the implementing federal regulations; and
(4) a violation of the Equal Protection Clause of the United States Constitution due to the irrational discrimination in payments made by Pennsylvania's medicaid program to out-of-state hospitals as contrasted to payments made in-state hospitals.

The District Court declared that Pennsylvania's payment system and her administrative appeals system violated federal law. 701 F. Supp. at 526; Appendix at B-67. The District Court ordered the Pennsylvania defendants to develop new payment and appeals systems by May 1, 1989. The District Court also awarded fees under 42 U.S.C. § 1988 after submission of a joint fee proposal by the parties.

In making the fee award, the District Court included expert witness fees, having concluded that the experts' work was "essential" to the District Court's decision. Appendix at C-2. Moreover, in the joint fee proposal submitted by WVUH and the Pennsylvania defendants, the parties stipulated that the experts' work, which encompassed both pretrial and trial work, was "necessary" and that $104,133.00 was a reasonable amount of compensation for such work. See Appendix at C-1 to C-2.

The Court of Appeals for the Third Circuit ultimately affirmed the District Court in all but two respects. First, the Court of Appeals held that expert witness fees were not compensable in an award of attorneys' fees under 42 U.S.C. 1988. 885 F.2d at 35; Appendix at A-48. This ruling is in direct conflict with rulings of the Seventh, Eighth, and Tenth Circuits. Secondly, the Court of Appeals reversed the District Court on the issue of the adequacy of Pennsylvania's administrative appeals system.

The Court of Appeals refused to rehear the case as requested by WVUH. Consequently, WVUH has petitioned this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

An Award Under 42 U.S.C. § 1988 May Include Expert Witness Fees.

The Third Circuit's ruling upon the compensability of expert witness fees under 42 U.S.C. § 1988 is a part of a multi-circuit conflict. The Fourth Circuit, the First Circuit, and now the Third Circuit hold that expert witness fees are not compensable under 42 U.S.C. § 1988.[2] See Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988); Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989); West Virginia University Hospitals, Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989) (Appendix at A-1 to A-49). By contrast, the Eighth Circuit, Tenth Circuit, and, most recently, the Seventh Circuit, have held that an award under 42 U.S.C. § 1988 may include expert witness fees. See SapaNajin v. Gunter, 857 F.2d 463 (8th Cir. 1988); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989).

This conflict between the Courts of Appeals on this issue is an important one which is best illustrated by the difference in approach taken by the Third Circuit and by the Seventh Circuit in their recent decisions. These decisions sharply contrast one another in their respective applications of this Court's decision in Missouri v. Jenkins, ___ U.S. ___, 109 S. Ct. 2463, 105 L.Ed.2d 229 (1989).

Missouri v. Jenkins clearly establishes that an award of attorneys' fees under 42 U.S.C. § 1988 is not limited to fees

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2 The First Circuit's holding in this regard extends only to testimonial work in court; the First Circuit has not yet decided whether nontestimonial work is compensable under 42 U.S.C. § 1988. See 880 F.2d at 1472.

generated by attorneys. Instead, this Court has ascertained that the Congressional intent behind 42 U.S.C. § 1988 is to provide a "'fully compensatory fee.'" See Missouri v. Jenkins, 109 S. Ct. at 2471, 105 L.Ed.2d at 242. In light of that intent, this Court has explained that fee awards may take into account the work of non-attorneys "whose labor contributes to the work product for which the attorney bills her client." 109 S. Ct. at 2470, 105 L.Ed.2d at 241.

Speaking for the Seventh Circuit in Friedrich v. City of Chicago, Judge Posner provides a thoughtful analysis of 42 U.S.C. § 1988 and of Missouri v. Jenkins, in which he specifically rejects the Third Circuit's conclusion reached in this case. First, Judge Posner points out that this Court has flatly rejected the argument that the plain language of 42 U.S.C. § 1988 contemplates a fee award for only an attorney's fees, not an expert's fee. 888 F.2d at 513. Following this Court's example in Missouri v. Jenkins, Judge Posner applies the paramount rule of statutory construction that the intention of the drafters of the legislation prevails over the strict language of the statute. Id. at 514 (citing United States v. Ron Pair Enterprise, Inc., ___ U.S. ___, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989)). Judge Posner succinctly states:

> *When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation -- it is interpretation in a sense that has been orthodox since Aristotle -- for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words. That is what the Supreme Court did in the Jenkins case.*

888 F.2d at 514.

In his analysis, Judge Posner recites the history of the enactment of 42 U.S.C. § 1988, beginning with this Court's

holding in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). That history clearly reveals Congress' intention to overrule Alyeska by the enactment of 42 U.S.C. § 1988 to provide for a fully compensatory fee -- a fact noted by this Court in Missouri v. Jenkins when addressing the issue of whether paralegal fees were compensable under 42 U.S.C. § 1988. 109 S. Ct. at 2470-2471, 105 L.Ed.2d at 241-242; see also Friedrich v. City of Chicago, 888 F.2d at 514.

Just as paralegals assist in the preparation of an attorney's work product, experts educate counsel and preclude the need for the attorney to educate himself, which would obviously require more time and run up an attorney's fees even more. 888 F.2d at 514. Judge Posner wisely warns that a refusal to pay experts' fees would encourage underspecialization and inefficient trial preparation "just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work." Id.

While the Third Circuit attempts to distinguish Missouri v. Jenkins, see 885 F.2d at 34; Appendix A-47, Judge Posner persuasively and cogently rejects the possibility that Missouri v. Jenkins is distinguishable. 888 F.2d at 514. The Third Circuit holds that, because witness fees are governed by 28 U.S.C. 1821, the controlling precedent is Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), rather than Missouri v. Jenkins. 885 F.2d at 34; App. A-47. What the Third Circuit ignores, but Judge Posner does not, is the fact that Crawford did not involve 42 U.S.C. § 1988. 888 F.2d at 515. Indeed, 28 U.S.C. § 1821 is specifically inapplicable where another statute, like 42 U.S.C. § 1988, provides for costs or fees. 888 F.2d at 515.

Even if 28 U.S.C. § 1821 were applicable, Judge Posner observes that that statute deals only with testimonial work performed by experts; it does not affect nontestimonial work by experts. Therefore, expert fees for non-testimonial work are not controlled in any way by Crawford. Id.; see also Denny v.

Westfield State College, 880 F.2d at 1472 (in which the First Circuit also notes the distinction).

Judge Posner also rejects arguments, based upon Crawford, to the effect that courts should not lightly infer a repeal of 28 U.S.C. § 1821 by provisions of law that do not explicitly refer to witness fees. 888 F.2d at 515. Again, Judge Posner points out that it is Congressional intent that controls and that, based on that intent, witness fee awards under 42 U.S.C. § 1988 are excluded from 28 U.S.C. § 1821. Id. at 516.

The Congressional intent to exclude expert witness fees from the reach of 28 U.S.C. § 1821 is apparent from the history of 42 U.S.C. § 1988. Prior to this Court's decision in Alyeska, the federal courts awarded expert witness fees under what they believed to be their general equitable powers. In Alyeska, this Court held that the equitable powers of the federal courts were not so broad. Congress reacted to Alyeska by enacting 42 U.S.C. § 1988 to grant such equitable powers. Judge Posner in Friedrich provides a telling discussion of the status of pre-Alyeska law and the evidence of the Congressional intent to return to the status of pre-Alyeska law, which authorized reimbursement of expert witness fees. 888 F.2d at 517-518. His conclusion that expert witness fees are compensable under 42 U.S.C. § 1988 is compelled by the history of that statute's enactment and this Court's decision in Missouri v. Jenkins.

This Court has long heeded the rule of giving effect to legislative intent and has required the lower courts to honor that rule. The Third Circuit has failed to do so. This Court's decision in Missouri v. Jenkins rejected the facile argument, now adopted by the Third Circuit in this case, that the words "attorney's fees" in 42 U.S.C. § 1988 mean only fees generated by attorneys. Having decided in Missouri v. Jenkins that paralegal work is compensable under 42 U.S.C. § 1988, this Court ought now to address the parallel issue raised by the Third Circuit's erroneous decision in

this case. By doing so, this Court will resolve the continuing and growing conflict between the Courts of Appeals.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted. The question presented fully satisfies the criteria set forth in Rule 17 of the Rules of the Supreme Court.

Therefore, WVUH requests that a writ of certiorari issue to review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.

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December 22, 1989

APPENDIX A

FILED: SEPTEMBER 5, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-5165

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.

v.

ROBERT CASEY, Governor, Commonwealth of Pennsylvania; **JOHN WHITE,** Secretary, Department of Public Welfare; **DAVID S. FEINBERG,** Director, Office of Medical Assistance; **THE DEPARTMENT OF PUBLIC WELFARE,**

Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Docket No. Civil 86-0955

Argued May 22, 1989
Before BECKER, STAPLETON, and ROSENN,

Circuit Judges
Opinion Filed September 5, 1989

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OPINION OF THE COURT

ROSENN, J., Circuit Judge

This interesting and complex appeal arises from the cross-fire currently trapping many hospitals across our nation between rising operating costs, on the one hand, and federal legislation aimed at the sharp containment of health delivery costs, on the other. The plaintiff, West Virginia University Hospitals, Inc. (WVUH or the Hospital), brought this action against certain Pennsylvania state officials under the Civil Rights Act, 42 U.S.C. § 1983, alleging that the Pennsylvania program for providing medicaid reimbursement to an out-of-state hospital such as WVUH violated federal medicaid standards encompassed by Title XIX of the federal Social Security Act and violated the equal protection clause of the fourteenth amendment to the United States Constitution. WVUH also claimed that Pennsylvania's administrative appeals system was legally inadequate. The Hospital sought injunctive and declaratory relief invalidating the out-of-state aspects of the State's hospital reimbursement program.

After a bench trial before the United States District Court for the Middle District of Pennsylvania, the district court, in a thoughtful and painstaking opinion published at 701 F. Supp. 496 (M.D. Pa. 1988), granted WVUH's request for relief on all counts. District Judge Rambo concluded that Pennsylvania's reimbursement program as applied to WVUH violated both federal statutory law and the equal protection clause of the Constitution, and held that the state's administrative appeal system was legally inadequate. She ordered Pennsylvania to revise its reimbursement methodology for WVUH and to formulate an adequate and meaningful medicaid administrative appeals system for the Hospital. Additionally, the court held that the State must permit WVUH to avail itself of the new appeals system to challenge its reimbursements from the date the Hospital commenced this action, rather than from the date of

judgment. Finally, in an unpublished memorandum and order also issued the day of judgment, the district court awarded attorneys fees to the plaintiff pursuant to 42 U.S.C. § 1988 in the amount of $500,000, of which $104,133 was attributable to expert witness fees and costs.

Pennsylvania appeals, challenging the decision on the merits, the scope of relief, and the award of expert witness fees. We affirm in part and reverse in part.

I. FACTS

A. The Parties.

The plaintiff WVUH is a university-affiliated teaching hospital located six miles south of the border between West Virginia and Pennsylvania. As a "tertiary care" hospital, WVUH provides a complex level of hospital and medical services not generally found in community hospitals. WVUH is the closest source of tertiary care for many residents in the Pennsylvania counties of Fayette and Greene, and provides services as well to residents of the Pennsylvania county of Washington. Historically, the Hospital has provided significant numbers of Pennsylvania medicaid patients with hospital care. For the years 1984 to 1987, WVUH gave inpatient hospital care to more Pennsylvania medicaid patients than did over one-half of the hospitals located in Pennsylvania. Five percent of all WVUH inpatient admissions are attributable to Pennsylvania medicaid recipients, while overall medicaid patients at WVUH constitute twenty-three percent of all admissions. WVUH is by far the largest out-of-state provider of medical services to Pennsylvania medicaid recipients.

The defendants in this action are Pennsylvania Governor Robert Casey, John F. White, the Secretary of Pennsylvania's Department of Public Welfare (DPW), and David Feinberg, the DPW official responsible for developing the Pennsylvania

hospital reimbursement program at issue in this case. Although technically incorrect, for simplicity's sake this opinion may occasionally use the words "Pennsylvania" or "the State" when referring to the defendants.

B. The federal medicaid act.

In 1965 Congress enacted Title XIX of the Social Security Act (known as Medicaid or The Medicaid Act) to provide medical assistance to needy persons. 42 U.S.C. § 1396 et seq. The purpose of the act was to provide a nationwide program of medical assistance for low income families and individuals. Medicaid became the primary source of health care coverage for the poor in America. The program is jointly financed with federal and state funds "and is basically administered by each state within certain broad requirements and guidelines." House Subcomm. on Health and the Environment, Data on the Medicaid Program: Eligibility, Services, Expenditures Fiscal Years 1967-77, H.R. Rep. No. 10, 95th Cong., 1st Sess. 1. The federal unit currently responsible for overseeing the medicaid program is the Health Care Financing Administration (HCFA). Federal law requires that one state agency must be designated as the single state agency responsible for the administration of the program. The state determines the scope of the services offered and generally determines the eligibility level for the programs. Id. at 1-2. Thus, the Act implemented a federal-state joint venture in which participating states receive federal medicaid funds in return for administering a medicaid program developed by the state within the parameters established by federal law and regulations.

Before 1980, Title XIX require states to pay hospitals the "reasonable cost" of rendering inpatient hospital services to medicaid recipients. This requirement translated into a retrospective form of reimbursement based on the actual costs incurred by the hospitals in providing medicaid services. In 1981, however, Congress, hoping to contain escalating medicaid costs, enacted as part of the 1981 Omnibus Budget Reconciliation Act

(OBRA), P.L. 97-35, a new standard of hospital reimbursement. The OBRA replaced the "reasonable cost" standard with the current standard of "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." 42 U.S.C.A. § 1396(a)(13)(A) (West Supp. 1989).

The 1981 OBRA also reduced federal oversight of states' reimbursement methodologies. Pursuant to section 1396a(a)(13)(A), the HCFA will approve a state reimbursement plan based on the state's satisfactory "assurances" that the plan is in compliance with federal requirements. These requirements are reflected both in the statute itself and in its implementing regulations published by the HCFA in interim form in 1981 and in final form in 1983. 42 C.F.R. §§ 447.250-447.280.

C. The Pennsylvania medicaid program: operating cost, direct medical education cost, and capital cost reimbursement.

In Pennsylvania, DPW is the state agency responsible for administering medicaid. The medicaid program developed by DPW for the state is called the "Medicaid Assistance Program" or "MAP."

Consistent with the 1981 federal policy change with respect to hospital reimbursement, Pennsylvania developed a "prospective payment system" (PPS) for reimbursement of hospitals to contain escalating costs associated with medicaid services. This system, effective beginning fiscal year 1984-1985, replaced the retrospective method of reimbursement with a prospective method. Under this system, each hospital admission is classified according to the patient's illness diagnosis into 1 of 477 categories known as Diagnostic Related Groups (DRGs). 53 Fed. Reg. 38,576-89 (1988). A hospital is reimbursed in accordance with the flat fee fixed for the applicable category -- regardless of the number of services used or the patient's length of stay. The DRG

system, being prospective in nature, will sometimes undercompensate for a given service and will sometimes overcompensate. The expectation, however, is that in the aggregate an efficiently operated hospital will receive an appropriate amount to reimburse it for medicaid services.

Unquestionably, Pennsylvania's PPS treats in-state hospitals differently than out-of-state hospitals. Rate calculation for in-state hospitals depends on the type of hospital seeking reimbursement and the average cost for that type of hospital. Under the PPS, all participating in-state hospitals, approximately 233 in number, are assigned to one of seven groups. Grouping for in-state hospitals takes into account four concepts: teaching status, medicaid volume, environmental characteristics, and hospital costs. These four concepts are measured by a total of thirteen variables, including such things as the number of resident and intern programs, total number of patients, area wage index, and so on. The actual grouping of in-state hospitals is accomplished by a computer program.

After classifying the in-state hospitals, Pennsylvania then determines a group average cost per case, which is based on actual allowable costs and adjusted for inflation and budget neutrality. The hospitals in Group 1 have the highest group rate, and those in Group 7 have the lowest.

To determine the amount of reimbursement to in-state hospitals under the PPS, Pennsylvania multiplies the relative value of the DRG by the hospital's group average cost per case. The higher the group rate, the higher the payment for a given DRG. Thus, Pennsylvania pays a Group 1 hospital more to treat a given DRG than it pays a Group 2, 3, 4, 5, 6, or 7 hospital to treat that DRG.

Out-of-state hospitals, on the other hand, receive quite different treatment under the PPS. Unlike in-state hospitals, out-of-state hospitals are not grouped according to the concepts of

hospital costs, teaching status, medicaid volume, and environment. Instead they are treated on the basis of one factor only: their geographical location outside Pennsylvania. Moreover, the group rate assigned to out-of-state hospitals is not based on the average allowable costs of that group based on historical data, but rather on the average of payments made to in-state hospital providers. To reimburse inpatient operating costs of out-of-state hospitals, Pennsylvania multiplies the relative value of the DRG assigned to the patient's illness by the Pennsylvania statewide average cost per case or pays the hospital's actual charges for treating that illness, whichever is lower.

Aside from operating cost reimbursement under the PPS, the MAP provides in-state hospitals additional hospital reimbursement on the basis of two other considerations: direct medical education costs (DME) and capital costs. Again, out-of-state hospitals are treated differently with respect to these two bases of medicaid reimbursement.

In-state hospitals receive an amount, in addition to their operating cost reimbursements, to reimburse them for the direct medical education (DME) costs (if any) associated with their medicaid service. For the years 1984 to 1986, Pennsylvania reimbursed in-state hospitals for the MAP share of their DME costs on an actual cost basis subject to certain limitations. Beginning fiscal year 1986-1987, Pennsylvania limits reimbursement to in-state hospitals for DME costs to 1.9 percent over the amount paid the hospital for DME costs the previous year, or the hospital's allowable DME costs, whichever is lower.

In contrast, Pennsylvania decided as a matter of policy not to pay out-of-state hospitals for DME costs associated with medicaid. Thus, teaching hospitals such as WVUH receive no DME cost reimbursement from Pennsylvania when they treat Pennsylvania medicaid patients.

Finally, in addition to reimbursement of inpatient operating costs under the PPS and in addition to payments for DME costs, Pennsylvania reimburses in-state hospitals for their allowable capital costs. For the period July 1, 1984 through June 30, 1986, reimbursement of in-state hospitals' capital costs was based on actual capital costs incurred. After that date, Pennsylvania initiated a prospective payment system for reimbursement of in-state hospitals' capital costs to be phased in between July 1, 1986, and June 30, 1992. During that period, Pennsylvania would pay in-state hospitals for their actual capital costs on a decreasing percentage basis. After July 1, 1992, the state will reimburse all in-state hospitals at the same flat rate for their capital costs.

Out-of-state hospitals are not reimbursed for their capital costs in the same manner. The Pennsylvania medicaid prospective payment system has never reimbursed out-of-state hospitals using actual allowable costs of capital. Pennsylvania pays out-of-state hospitals an "add-on" for capital reimbursement that represents the average capital costs of all Pennsylvania hospitals. That "add-on" bears no relationship to the actual capital costs of out-of-state hospitals. Moreover, although the MAP gave in-state hospitals approximately ten years to adjust to a flat rate payment for capital costs, out-of-state hospitals were allowed no phase-in period to adjust to a prospective payment system for such costs.

B. The MAP appeals system.

Pursuant to federal regulation, the state medicaid agency must provide hospitals with a system by which to appeal. In Pennsylvania the administrative agency division that adjudicates the appeals is the DPW's Office of Hearings and Appeals (OHA). The OHA hearing officer recommends a decision to the Director of OHA, who either adopts or rejects the recommendation. Both parties have the right to request reconsideration from the Secretary of DPW. Outside of the administrative appeals process, review of the decision of the Director of OHA or the Secretary of

DPW may be sought through the judicial system of the Commonwealth of Pennsylvania.

II. THE DISTRICT COURT'S DECISION

WVUH initiated this action on July 16, 1986. After a six-day bench trial in May 1988, the district court concluded that in all aspects -- operating costs, DME costs, and capital costs -- Pennsylvania's reimbursement program fell considerably short of the requirements of Title XIX and violated federal law. Moreover, the court concluded that Pennsylvania's classification of hospitals, affording different treatment to hospitals depending on their location inside or outside the state, violated WVUH's rights under the equal protection clause of the United States Constitution. Finally, the court declared Pennsylvania's administrative appeal system invalid because it allowed a hospital to challenge only the application of the state's methodology, rather than the methodology itself. The court ordered Pennsylvania to revise its medicaid reimbursement program and administrative appeals system as they applied to WVUH and to allow the Hospital to employ the revised appeal system to challenge reimbursements from the date the action was commenced. Pursuant to 42 U.S.C. § 1988, the district court awarded attorneys fees, which included expert witness fees, to WVUH as the prevailing party. The defendants appeal.

III. WVUH's RIGHT TO CHALLENGE THE REIMBURSEMENT PROGRAM

Before assessing the validity of Pennsylvania's medicaid reimbursement program, we first address the preliminary question whether WVUH has a cause of action entitling it to challenge the program.

The threshold issue in this case is whether WVUH can assert a cause of action against the defendant state officials under 42 U.S.C. § 1983 for alleged violation of the federal medicaid statute. Section 1983 provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or . . . the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Pennsylvania argues that a hospital cannot state a valid claim under section 1983 for alleged violation of the medicaid statute with respect to hospital reimbursement. This court has not previously had the opportunity to rule on this question of law.

Section 1983 provides a remedy for deprivation under color of state law of "any rights . . . secured by the Constitution and laws." 42 U.S.C. § 1983 (emphasis added). Interpreting this language in Maine v. Thiboutot, 448 U.S. 1 (1980), the Supreme Court held that the phrase "and laws" does not implicitly refer only to equal rights laws (making only equal rights violations actionable under section 1983), but rather refers generally to all federal statutory law. The plain language of section 1983, together with its legislative history and the Court's past treatment of the provision, compels the conclusion that causes of action under section 1983 are not limited to claims based on constitutional or equal rights violations. 448 U.S. at 6-8.

Thiboutot, however, does not stand for the broad proposition that section 1983 provides a cause of action for any violation of any federal law. As subsequent cases explain, a cause of action

under 1983 exists for violation of a federal law if two requirements are met. First, the federal law must create private rights enforceable under section 1983. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). In Pennhurst the Court held that a section 1983 action did not lie for alleged violation of the Developmentally Disabled Assistance and Bill of Rights Act because that Act conferred no substantive rights but merely constituted a congressional declaration of policy. Id. at 18-27. With respect to the existence of the private rights requirement, valid federal regulations as well as federal statutes may create rights enforceable under section 1983. Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 431-32 (1987) (HUD regulations defining statutory term "rent" as including a "reasonable amount" for utilities grants tenants rights enforceable under section 1983); Alexander v. Polk, 750 F.2d 250, 259 (3d Cir. 1984) (WIC regulation creates enforceable right to notice of fair hearing).

Second, and stated negatively, the federal law must not reflect a congressional intent to foreclose private enforcement. Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). In Sea Clammers, the Court held that a cause of action for violation of two federal environmental statutes did not lie because the comprehensive remedial schemes provided in those statutes reflect a congressional intent to foreclose a private remedy under section 1983. Id. at 21. The burden of proving a congressional intent to foreclose a section 1983 remedy, however, lies with the state actor, and that burden is not easily satisfied. Once it is determined that a federal provision creates an enforceable right, a cause of action exists under section 1983 for violation of that provision "unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." Wright, 479 U.S. at 423. A court deciding the issue may not

"'lightly conclude'" that Congress intended such foreclosure. Id. at 423-24 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984).[1]

Undertaking the analysis, then, the first question is whether the Medicaid Act, Title XIX of the federal Social Security Act, 42 U.S.C.A. §§ 1396 through 1396s (West 1983 & Supp. 1989), creates private rights in favor of hospitals participating in a state's medicaid program. Following the example set by the Court in Pennhurst, we seek the answer to this question in the language, purpose, and legislative history of the statute alleged to have been violated.

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1 WVUH in its supplemental brief urges us to apply the test articulated in Cort v. Ash, 422 U.S. 66 (1975), for determining whether a statute implies a private right of action. The Hospital should be happy that we refuse its request and instead apply the traditional, and, coincidentally for it, more favorable analysis to determine private enforceability under § 1983. Whether a federal statute is enforceable under § 1983 and whether the statute creates an implied right of action involve separate inquiries. See, e.g., Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981).

For the sake of clarity, we briefly explain the difference between a § 1983 private right of action analysis and the general implied right of action analysis of Cort v. Ash. When a statute does not explicitly supply a private right of action, two occasionally intersecting avenues may be explored for a possible private right of enforcement. First, an implied private right of action to enforce the statute may exist directly under the statute in accordance with the four-factor analysis of Cort v. Ash. To establish an implied right of action under Cort v. Ash, the plaintiff must satisfy the first requirement -- that the statute creates a federal right in favor of the plaintiff. The plaintiff must then satisfy the three remainig Cort v. Ash requirements relating to the existence of a remedy -- that Congress intended to create a remedy, that the remedy is consistent with the legislative scheme, and that the cause of action is not traditionally relegated to state law. In sum, under Cort v. Ash the plaintiff bears the burden of establishing not only the existence of a right, but also the existence of an intended private remedy.

Generally, the Medicaid Act consists of numerous sections and subsections that together form a cooperative mosaic through which the federal government reimburses a portion of the payments made by participating states to hospitals and other providers furnishing care to eligible needy persons. States participating in the program are charged with administering the medicaid plan and distributing the state and federal funds. Participation in the program is voluntary, but once a state chooses to participate it is obligated to devise a medicaid plan that complies with the federal statutory and regulatory conditions of funding. See Pennhurst, 451 U.S. at 11 (state participation in federal-state cooperative program to treat developmentally disabled carries obligation to comply with federal law).

Section 1396a of the medicaid act enumerates the various federal requirements of state medicaid plans. In particular, subsection 1396a(a)(13)(A) imposes federal requirements on states' reimbursement to hospitals and other entities providing care to medicaid patients. It is this subsection that WVUH charges the defendants violated, and it is to this subsection, therefore, that we turn to ascertain whether it created substantive

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In appropriate cases, the second avenues for private enforcement of a federal statute is § 1983. In determining whether a private right of action exists under § 1983, only two inquiries are relevant: one, whether the statute alleged to have been violated creates a federal right in favor of the plaintiff, and the other, whether Congress has forclosed the remedy of private enforcement. The § 1983 analysis intersects with the Cort v. Ash analysis insofar as the plaintff under both analyses must establish the creation of a federal right. With respect to the existence of a remedy, however, the contrast between the two analyses is stark. Under Cort v. Ash the plaintiff must establish that Congress intended the remedy. Under § 1983 analysis, on the other hand, once a federal right is established, the existence of a remedy is presumed because § 1983 itself provides the authorization for private enforcement. The burden is on the defendant to establish that Congress intended to foreclose private enforcement.

private rights enforceable under section 1983 in favor of hospitals offering care to medicaid patients.

We begin with the statutory language. Section 1396a(a)(13)(A) stipulates, in pertinent part, that

> A State plan for medical assistance must -- . . .
>
> (13) provide --
>
> (A) for payment . . . of the hospital . . . services provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State and which, in the case of hospitals, take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs . . .) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities . . . .

42 U.S.C.A. § 1396a(a) (West Supp. 1989) (emphasis added). The language of this subsection is "cast in the imperative," see Alexander v. Polk, 750 F.2d at 259, mandating the state to maintain at least some sort of standard (the nature of which is better left for the merits discussion) in its hospital reimbursement plan. The language succinctly sets forth a congressional command, which is wholly uncharacteristic of a mere suggestion or "'nudge,'" Pennhurst, 451 U.S. at 19 (quoting Rosado v. Wyman, 397 U.S. 397, 413 (1970)), in the direction of providing appropriate reimbursement of hospitals treating medicaid patients.

The construction of this subsection treating hospital reimbursement is parallel to the construction of the other forty-nine provisions imposing federal requirements on state

medicaid programs. All provisions are prefaced by the language that "[a] State plan for medical assistance must . . . ." There can be no mistaking that the stipulations of section 1396a(a) clearly constitute conditions that a state must meet to participate in the joint program.

In this respect, the statutory language of section 1396a(a) differs from the language examined in Pennhurst. In that case, the Court held that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010, did not create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive environment." The Court compared the "bill of rights" provision with other sections of the act and observed that "[n]oticeably absent from 6010 is any language suggesting that 6010 is a 'condition' for the receipt of federal funding under the Act," making section 6010 stand "in sharp contrast" to the other sections that manifestly were conditions. 451 U.S. at 13. The Court's concern in Pennhurst that a state might not realize that its participation in a federal-state program is subject to federal conditions is relieved here by the express and imperative language of the Medicaid Act.

Defendants assert, however, that the purpose of the medicaid program weighs against finding that section 1396a(a)(13)(A) affords substantive rights to hospitals offering care to medicaid patients. They argue that imposing federal requirements with respect to hospital reimbursement does not equate with granting substantive rights in favor of hospitals to legally enforce reimbursement. The Medicaid Act helps states to fund a public assistance medical program for the financially needy, and therefore, defendants conclude any benefit conferred on hospitals is purely incidental. The beneficiaries of the act, argue defendants, are the needy persons assisted by medicaid, not the providers from whom the state buys medical services.

We recognize, of course, that the primary purpose of medicaid is to achieve the praiseworthy social objective of granting health care coverage to those who cannot afford it. It does not necessarily follow, however, that Title XIX grants substantive rights only to medicaid patients. Although the broad purpose of the Medicaid Act as a whole is to help the poor attain medical care, the specific purpose of section 1396a(a)(13)(A) is to assure state compliance with some federal standard of hospital reimbursement. The section sets up a plan for the adequate and reasonable reimbursement of hospitals which serve medicaid patients, and thus the hospitals are the section's "beneficiaries." Their interests and the interests of medicaid patients are bonded by a common goal, the delivery of adequate health care by the hospitals to state medicaid patients and the enjoyment of such care by the patients. The interests of both are intertwined and hospitals have a concrete stake in reimbursement in accordance with the federal statute and regulations.

Other courts have allowed health providers to challenge state medicaid plans as violative of Title XIX because they considered the interests of health providers and of medicaid patients to be "parallel." See, e.g., Coos Bay Care Center v. Oregon, Dep't of Human Resources, 803 F.2d 1060, 1063 (9th Cir. 1986) (private health care facility's challenge of medicaid program states a claim under section 1983), cert. granted, 481 U.S. 1036, vacated as moot, 108 S. Ct. 52 (1987); Nebraska Health Care Ass'n v. Dunning, 778 F.2d 1291, 1296 (8th Cir. 1985) (long-term medical care facilities may maintain section 1983 action challenging medicaid plan). Although we approve of these cases, their reasoning may sometimes suggest that they are concerned with a sort of representative standing rather than the creation of federal rights in favor of the health providers.

We prefer to ground our decision more explicitly and precisely on our conclusion that Title XIX affords enforceable rights to hospitals serving medicaid patients. In this respect, we join with the Fourth Circuit, which recently arrived at the same conclusion

after full analysis of the issue, see Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653, 657-61 (4th Cir. 1989), petition for cert. filed (June 15, 1989), and the Tenth Circuit, which adopted the Fourth Circuit's reasoning and result in a like case. See Amisub, Inc. v. Colorado Dep't of Social Services, No. 88-2482, slip op. at 10 (10th Cir. July 11, 1989). Cf. Silver v. Baggiano, 804 F.2d 1211, 1217 (11th Cir. 1986) (expressly reserving question whether Social Security Act creates a right enforceable by a health provider under section 1983). Furthermore, once it is determined that WVUH has a private enforceable right under section 1983, we have no doubt as to its standing to bring this action. See Amisub, slip op. at 11.

The legislative history of section 1396a(a)(13)(A) buttresses our conclusion that WVUH has a private right to enforce the federal hospital reimbursement standard. In the Joint Explanatory Statement of the Committee of Conference commenting on the 1981 OBRA as enacted, Congress expressed its concern that state reimbursement methodologies adequately compensate hospitals for their care of medicaid patients. The report states: "the conferees intend that State hospital reimbursement policies should meet the costs that must be incurred by efficiently-administered hospitals in providing covered care and services to medicaid eligible as well as the costs required to provide care in conformity with State and Federal requirements." H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess., 962, reprinted in 1981 U.S. Code Cong. & Admin. News 1010, 1324. The same report also emphasizes the inclusion in the Title XIX amendment of a provision "providing that the States, in developing their payment rates, take into account the situation of hospitals . . . which serve a disproportionate number of low income patients." Id. We believe that Congress's concern with appropriate hospital reimbursement implies an intent to supply hospitals with an indispensable right to enforce state compliance with federal standards that, whether strictly or loosely, govern state reimbursement methodologies. Who else is more aggrieved by the absence of an adequate or reasonable hospital

reimbursement rate than a disadvantaged hospital and who has a more compelling interest to press for a correction? We therefore conclude that the beneficiaries of section 1396(a) are the hospitals that serve medicaid patients and that they have an enforceable private right.

Having determined that Title XIX supplies WVUH with private rights enforceable under section 1983, we next inquire whether the medicaid statute reflects a congressional intent to foreclose private enforcement. In accordance with the law as we described it above, WVUH has a remedy under section 1983 to enforce its rights under Title XIX unless defendants demonstrate that Congress intended to preclude private enforcement of that federal law.

Pennsylvania argues that Title XIX reflects a congressional intent to foreclose private enforcement of hospitals' rights because the statute requires the Department of Public Welfare to provide hospitals with an administrative remedy and because all state medicaid plans are subject to review by the Secretary of Health and Human Services and disapproval of a plan may result in suspension or reduction of federal payments. We believe, however, that Pennsylvania fails to carry its burden of proving that these remedial devices are "'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under 1983.'" Wright v. City of Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 424 (1987) (quoting Sea Clammers, 453 U.S. at 20). Title XIX gives no indication that the cut-off of funds to the federal agency is intended to supplant a section 1983 remedy. As the Supreme Court has recently held, "the existence of a state administrative remedy does not ordinarily foreclose resort to 1983." Wright, 479 U.S. at 427-28 (citing Patsy v. Board of Regents of Florida, 457 U.S. 496, 516 (1982)). Moreover, we fail to perceive how the cut-off of funds in futuro to the state agency effectively reimburses a hospital for services rendered to the state's medicaid patients in the past. We therefore conclude

that WVUH states a valid claim under section 1983 for enforcement of its rights under the Social Security Act.[2]

IV. THE VALIDITY OF PENNSYLVANIA'S HOSPITAL REIMBURSEMENT PROGRAM

We now arrive at the heart of this case -- whether Pennsylvania's plan for reimbursing out-of-state hospitals for their inpatient services to Pennsylvania medicaid recipients complies with federal statutory and regulatory law. The answer requires a close examination of Title XIX, its objectives, its legislative history, and its implementing regulations.

Section 1396a(a)(13)(A) provides in relevant part as follows:

> A State plan for medical assistance must -- . . . provide -- . . . for payment . . . of the hospital . . . services provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State and which, in the case of hospitals, take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs . . .) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access (taking into account geographic location and reasonable travel time) to inpatient hospital services of adequate quality; and such State makes further assurances, satisfactory to the Secretary, for the filing of uniform cost reports by each hospital . . . and periodic audits by the State of such reports . . . .

42 U.S.C.A. § 1396a (West Supp. 1989). This section, as we read it, authorizes states to develop their own medicaid reimbursement standards and methodologies for payment of hospital services, but subjects those standards and methodologies to three general federal requirements.

The first requirement, deriving from the parenthetical modifying "rates," mandates that a state's reimbursement rates take into account the situations of those hospitals serving a disproportionate number of low income patients. The second and third requirements, found in the phrase following that parenthetical, require a state to find that its rates are reasonable and adequate to meet the necessary costs of an efficiently operated hospital and to assure medicaid patients of reasonable access to inpatient hospital care. The first requirement we term the "disproportionate share" requirement, the second, the "reasonable and adequate" requirement, and the third, the "reasonable access" requirement. The federal regulations implementing section 1396a(a)(13)(A), 42 C.F.R. §§ 447.250-447.280, reiterate these statutory demands.

Our assessment of compliance with these three requirements is informed by the goals and purposes of the medicaid statute as reflected in its structure and legislative history. Section 1396a(a)(13)(A) was enacted as part of the 1981 Omnibus Budget Reconciliation Act, 95 Stat. 357, (OBRA) in an effort to contain the spiraling costs of inpatient hospital services and to reduce potentially stifling and expensive federal oversight of state

2 We note that exhaustion of state administrative remedies is not a prerequisite to an action under § 1983. Robinson v. Block, 869 F.2d 202, 207 n. 5 (3d Cir. 1989).

methodologies. See Colorado Health Care Ass'n v. Colorado Dep't of Social Services, 842 F.2d 1158, 1165 (10th Cir. 1988) (discussing purposes of the Boren Amendment); Wisconsin Hosp. Ass'n v. Reivitz, 733 F.2d 1226, 1228 (7th Cir. 1984) (same). As explained in the House report accompanying an earlier version of the statute, Congress intended by section 1396a(a)(13)(A) to free states from the previous "reasonable cost" criterion and to encourage them to develop prospective reimbursement systems that would foster hospital efficiency and reduce medicaid costs. See H.R. Rep. No. 158, 97th Cong., 1st Sess. 292. States were to be allowed "greater latitude" and "greater flexibility" in designing their programs. See id. at 293; S. Rep. No. 139, 97th Cong., 1st Sess. 478, reprinted in 1981 U.S. Code Cong. & Admin. News 396, 744.

The states' discretion in devising new reimbursement standards and methodologies, however, was limited by the Congress's concern that medicaid recipients have reasonable access to medical services and that hospitals treating a disproportionate share of poor people receive adequate support from medicaid. Thus, a state's reimbursement rates may not be so low as to compel the closing of a dangerous number of hospitals or of a single medically important hospital, and thus compel medicaid recipients to travel an unreasonable distance to obtain medical care. See H.R. Rep. No. 158, 97th Cong., 1st Sess. 294 (expressing concern that rates not be so low as to discourage hospitals from treating medicaid patients). Moreover, because hospitals treating a large volume of medicaid patients are at the same time of singular importance to the health care of the poor and often already financially distressed, states must take into account these hospitals' special circumstances in setting reimbursement rates. See id. at 294-296 (discussing special needs and high social value of hospitals serving disproportionate number of poor people); H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 962, reprinted in 1981 U.S. Code Cong. & Admin. News 1010, 1324 ("The conferees recognize that public hospitals and teaching hospitals which serve a large Medicaid and low income

population are particularly dependent on Medicaid reimbursement, and are concerned that a State take into account the special situation that exists in these institutions in developing their rates.")

We believe that this scheme also contemplates a deferential standard of review by the courts in assessing compliance with the "reasonable and adequate" requirement of section 1396a(a)(13)(A). Applying a higher standard would run counter to the congressional intent that states be afforded considerable freedom in pursuing ways of limiting medicaid costs and encouraging efficiency. On the other hand, neither state budgetary restraints nor chauvinistic policies designed to curb access to out-of-state hospitals[3] can excuse a failure to conform to the federal "reasonable and adequate standard," Wisconsin Hosp. Ass'n, supra at 1235. In evaluating whether Pennsylvania's rates are "reasonable and adequate" to meet the costs of an efficiently

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3 At oral argument before us the following colloquy occurred between the court and counsel for the State:

> MR. FOERSTER: And the assumption was made that we had no evidence to the contrary, and still haven't, that the experience out-of-state as a whole is any different from the experience in state: that these hospitals would have about the same amount of medicaid utilization as does the average in-state hospital.
>
> THE COURT: If that's true, then why shouldn't West Virginia Hospital be factored in on the same basis as the Pennsylvania hospitals?
>
> MR. FOERSTER: Again I could only go back to what I answered before, the considerations that keep the money in-state, the treatment in-state, the marketing too.

Tr. 19-20.

operated hospital, we will not engage in an independent assessment of what rates we believe would be reasonable and adequate. Rather, we will only inquire whether the state's determination was arbitrary and capricious. See Mississippi Hospital Ass'n v. Heckler, 701 F.2d 511, 516 (5th Cir. 1983).

At the same time, however, we believe that compliance with the remaining two federal requirements -- reasonable access and disproportionate share -- is subject to our plenary review. The legislative history manifests Congress's strong concern that these requirements be invariably and fully satisfied. We will not presume to declare how the State must satisfy these requirements, but neither will we defer to the State's judgment that the requirements have indeed been met. With these standards of review in mind, we begin our evaluation of Pennsylvania's reimbursement program.

We question first whether Pennsylvania's reimbursement program as it applies to WVUH fulfills the disproportionate share requirement. See 42 C.F.R. § 447.253(b)(1)(ii)(A) (1988). The district court found that WVUH serves a disproportionate number of low income patients. Although only five percent of WVUH's admissions are Pennsylvania medicaid recipients, some thirty-eight percent of all WVUH admissions are low income persons.[4] The district court, appropriately taking a broad view of the issue, looked at WVUH's treatment of all low income patients, not just Pennsylvania medicaid patients, and found that the Hospital had established itself as a disproportionate share provider.

4 The district court found as a fact that in both fiscal years 1984-1985 and 1985-1986, WVUH treated in excess of 800 Pennsylvania medicaid patients. In fiscal year 1986-1987, it treated approximately 730 Pennsylvania medicaid patients. WVUH provided more care to Pennsylvaina medicaid residents than over one-half of the in-state hospitals for fiscal years ending June 10, 1986 and fiscal year ending June 30, 1987.

Pennsylvania, in its reimbursement system for in-state hospitals, accounts for disproportionate share through its grouping methodology for reimbursing operating costs. under Pennsylvania's in-state plan, medicaid volume is one of the four concepts that determine a hospital's assignment to one of seven hospital groups. A high medicaid volume may boost a hospital to a higher group rating, allowing the hospital to command a higher reimbursement rate per DRG. The methodology thus uses high medicaid volume as a proxy for disproportionate share of low income patients. In contrast, when Pennsylvania sets its reimbursement rates for out-of-state hospitals, it does not consider those hospitals' shares of low income admissions. Rather, Pennsylvania reimburses all out-of-state hospitals on the basis of the average payment it makes to in-state hospitals.

Significantly, Pennsylvania chose this method without first undertaking any studies examining the effects of its methodology on out-of-state low income providers. The State stipulated in the pretrial memorandum of undisputed facts that Pennsylvania did no empirical studies with respect to out-of-state payments and did not look at individual cost data for out-of-state hospitals. Moreover, the State stipulated that "[t]he out-of-state reimbursement methodology does not contain any provision with which to identify out-of-state hospitals serving a disproportionate share of low income patients and by which to reimburse those hospitals any more than other out-of-state hospitals are reimbursed." Appellee's Addendum of statutes, regulations, and stipulation of undisputed facts ¶ 133.

At oral argument, the State asserted that it accounted for disproportionate share of low-income providers when it determined the relative value of the DRG payment on the basis of in-state cost data. We fail to see, however, how this method fulfills the federal requirement. Pennsylvania assigned all out-of-state hospitals the average in-state payment rate, with no provision for increasing that rate on the basis of disproportionate share and no determination that the payment in itself would

account for the needs of disproportionate share of low-income providers. We see nothing in the development or implementation of the State's out-of-state reimbursement plan that demonstrates compliance with the federal mandate that rates account for disproportionate share. We therefore conclude that Pennsylvania's operating costs reimbursement system is invalid insofar as it fails to account for out-of-state hospitals' disproportionate share of low income admissions.

The second requirement of state medicaid plans is that their rates assure medicaid recipients of reasonable access to quality hospital care, taking into account geographic location and reasonable travel time. See 42 C.F.R. § 447.253(b)(1)(ii)(C) (1988).[5] Throughout the district court's opinion and the oral argument before us there ran an undercurrent of concern that inadequate reimbursement will encourage WVUH to close its doors to medicaid patients, leaving a considerable number of Pennsylvania residents without reasonable access to hospital care. At oral argument, defense counsel affirmed that without access to WVUH, some Pennsylvania medicaid patients would have to travel seventy miles or more to obtain tertiary hospital care. Moreover, the district court found, and Pennsylvania does not contest, that WVUH's withdrawal from the Pennsylvania medicaid plan would "jeopardize some Pennsylvania medicaid recipients' access to needed health care services." 701 F. Supp. at 509 (finding of fact # 181).

5 42 C.F.R § 431.52(b) requires that a state plan must provide that the State will furnish medicaid to : "(1) A recipient who is a recipient of the State while that recipient is in another State, to the same extent that medicaid is furnished to residents in the State," when the recipient meets certain prescribed conditions or "[i]t is general practice for recipients in a particular locality to use medical resources in another State."

The record establishes that the closing of WVUH to Pennsylvania medicaid patients would deprive some of those patients of reasonable access to needed health care. It is not, however, so clearly established that Pennsylvania's reimbursement system will result in the Hospital's withdrawal from the Pennsylvania medicaid plan, although there is a probability that it will withdraw because of the large number of Pennsylvania medicaid patients it treats and the substantial disparity in reimbursement between Pennsylvania medicaid recipients in Pennsylvania and those treated at WVUH. The district court found that inadequate medicaid reimbursement will have "substantial financial consequences for the Hospital and will jeopardize its continued ability to care for MAP patients." 701 F. Supp. at 509 (finding of fact # 180). The court also found that although on the average an in-state hospital is reimbursed for approximately ninety-five percent of its costs in treating a Pennsylvania medicaid recipient, WVUH recoups only about fifty-four percent of its costs in treating a Pennsylvania medicaid patient. In view of these facts, one can reasonably anticipate that WVUH will not continue indefinitely to treat Pennsylvania medicaid patients under the State's present reimbursement mechanism.

Nevertheless, the present record is somewhat incomplete on the point. There is no evidence that the Hospital has stopped treating medicaid patients, and the president of WVUH testified that WVUH has not yet seriously considered quitting the Pennsylvania medicaid plan. App. at 141a. We are therefore unprepared on this record to invalidate Pennsylvania's overall reimbursement plan as it applies to WVUH on the basis of nonfulfillment of the reasonable access requirement. Such a holding, we believe, would require remand to the district court for finding of the relevant facts. As explained infra, however, a remand will not be necessary in light of our conclusion with respect to compliance with the third federal requirement as well as our conclusion concerning the first federal requirement, supra at 30.

The third requirement imposed by section 1396a(a)(13)(A) is that the state must find that its rates are "reasonable and adequate" to meet the costs of an efficiently operated hospital.[6] Whereas the substantive dimensions of the first two requirements could be fairly drawn from the statute and its legislative history, discerning congressional intent with respect to the substantive element of the reasonable and adequate requirement is a more daunting project.

The states, we need hardly reiterate, enjoy broad discretion in devising their hospital reimbursement plans. The changes instituted by 1981 OBRA contemplated state experimentation with medicaid methodologies and certainly contemplated reduction in the outlay of medicaid funds. Importantly, the 1981 OBRA definitely contemplated that states would implement prospective payment systems that would not be based on actual costs. In promulgating regulations implementing section 1396a(a)(13)(A), the HCFA expressly refused to set a federal standard prescribing "reasonable and adequate" rates. It did observe, however, that "the term is not a precise number, but rather a rate which falls within a range of what could be considered reasonable and adequate." See 48 Fed. Reg. 56,046, 56,049 (Dec. 19, 1983). See also Colorado Health Care v. Colorado Dep't of Social Services, 842 F.2d 1158, 1167 (10th Cir. 1988) ("Reasonableness had been characterized as a zone, not a pinpoint.") (citing Reivitz, 733 F.2d at 1233).

It follows from the departure from a cost-driven reimbursement standard that a state's plan does not violate the substantive provision of the reasonable and adequate requirement simply because it fails to reimburse one efficiently operated hospital its actual costs. What matters, rather, as the State

6 The defendants have not asserted that WVUH is not an "efficiently and economically operated" facility.

vigorously argues, is whether the reimbursement rates to out-of-state hospitals in the aggregate are arbitrary and capricious.

Although Congress and the HCFA consciously declined to impose clearcut federal standards and requirements (with the exception of the reasonable access and disproportionate share requirements), the legislative history reflects congressional concerns that in turn may suggest some guidance as to what may constitute nonarbitrary reimbursement rates. The congressional reports concerning section 1396a(a)(13)(A) reflect a great sensitivity to the special needs of teaching and tertiary care hospitals. The House report accompanying an initial version of the statute states:

> The Committee intends States to recognize that facilities that provide teaching services or other specialized tertiary care services that may have operating costs which exceed those of a community hospital. The Committee is concerned that the reimbursement methods established by the States recognize the need to provide a full range of both primary care and tertiary care services to Medicaid beneficiaries and take into account the differences in operating costs of the various types of facilities needed to provide this broad scope of services . . . . Thus, while the Committee recognizes that in this time of economic constraint and reductions in Federal funds for Medicaid. States must be given the flexibility necessary to improve the Medicaid reimbursement mechanism, the Committee does not want such policies to result in arbitrary and unduly low reimbursement levels for hospital services.

H.R. Rep. No. 158, 97th Cong., 1st Sess. 294. The subsequent House conference report echoes the concern for teaching hospitals:

> The conferees recognize that public hospitals and teaching hospitals which serve a large medicaid and low income population are particularly dependent on Medicaid reimbursement, and are concerned that a State take into account the special situation that exists in these institutions in developing their rates.

H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 962, reprinted in U.S. Code Cong. & Admin. News 1010, 1324.

Teaching hospitals, the district court found and the defendants do not contest, incur greater costs than nonteaching hospitals in delivering the same service. 701 F. Supp. at 515. The court found that the bulk of a teaching hospital's direct medical education (DME) costs is made up of residents' salaries. And, the court continued, residents spend about seventy-five percent of their time administering patient care. Thus, the court concluded, reimbursement of DME costs is in large part a reimbursement for patient care. Id.

Pennsylvania's reimbursement methodology for in-state hospitals provides for increased payments to teaching hospitals. The reimbursement system for operating costs identifies teaching status as one of the four concepts relevant to grouping in-state hospitals. Teaching status may therefore increase a hospital's reimbursement per DRG. Moreover, above and beyond the operating costs reimbursement, the Pennsylvania program reimburses in-state teaching hospitals for the medicaid share of DME costs that the hospitals incur.

Pennsylvania recognizes that a teaching hospital will not be adequately reimbursed for the costs associated with its teaching

function if it is reimbursed at a rate deriving from the average indirect costs of teaching and nonteaching hospitals. 701 F. Supp. at 508. Moreover, Pennsylvania acknowledges that the failure of a payer to compensate for DME costs will necessarily shift those costs to another payer, and the failure of all payers to compensate for DME costs will eventually cause serious financial problems for the teaching hospital. Nevertheless, Pennsylvania provides no DME cost reimbursement to out-of-state hospitals.

Pennsylvania's justification is that it chose, as a matter of policy, not to reimburse the medicaid share of DME costs incurred by out-of-state hospitals in treating Pennsylvania medicaid patients because the state did not want to underwrite the medical education of residents and interns (even if some of them will be Pennsylvanian doctors)[7] at out-of-state hospitals. Pennsylvania's theory is "[n]othing in any law or regulation requires WVUH to be a teaching hospital." Thus, Pennsylvania presumes that rates would not be arbitrary even if they were to force WVUH to abandon its teaching role.

It is true that Congress did not specifically codify its manifest concern that medicaid rates be adequate to assure the continued existence of teaching hospitals. On the basis of only the statutory and regulatory language, there is therefore some merit to the proposition that rates fulfill the "reasonable and adequate" requirement, even if they do not reimburse DME costs, as long as they reimburse operating costs. Although it seems to strike a discordant note with the national agenda of the federal medicaid program, perhaps such state chauvinism as is displayed by Pennsylvania here might be tolerated under certain

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7 The district court observed that some 7% of WVUH residents practice in Pennsylvania. Moreover, as the district court observed, some of the residents in Pennsylvania teaching hospitals will practice out of state, yet Pennsylvania's program helps finance their training.

circumstances. On the other hand, we must give some content to the notion of nonarbitrary rates, and we therefore turn again to the legislative history. That legislative history suggests that Congress intended teaching hospitals in general, not just those within state borders, to be adequately supported by medicaid plans. See supra at 35.

We hesitate, however, at this point to hold that Pennsylvania's refusal to reimburse out-of-state hospitals' DME costs is arbitrary and capricious and in violation of the reasonable and adequate requirement of section 1396a(a)(13)(A). We remain fully cognizant of the states' freedom to experiment with their reimbursement systems, and do not want unnecessarily to restrict it. Instead, withholding judgment on this aspect of the plan individually, we examine the plan as a whole.

Under Pennsylvania's plan, WVUH receives reimbursement for operating costs at the average rate of payment for all in-state hospitals (or based on the Hospital's actual charges, whichever is lower), notwithstanding WVUH's character as a teaching hospital ...t provides tertiary care and serves a disproportionate number of low income patients. Moreover, simply because WVUH is not an in-state hospital, it receives absolutely no DME cost reimbursement. Finally, unlike in-state hospitals, WVUH's is reimbursed for its capital costs on the basis of a rate that bears no relationship to its actual costs. Pennsylvania reimburses its in-state hospitals on the basis of a ten-year phase-in plan that pays in-state hospitals for their actual capital costs on a decreasing percentage basis. After the ten years, a uniform flat rate will apply. Contrast that system with the out-of-state reimbursement. Capital cost reimbursement to out-of-state hospitals consists of an "add-on" that represents the average capital costs of all in-state hospitals' actual costs. And out-of-state hospitals do not enjoy the benefit of a ten-year phase-in to adjust to the flat payment rate. WVUH is particularly distressed by the capital cost reimbursement system because it recently opened a replacement facility which greatly increased its capital costs.

As we note above, the district court found that this dual reimbursement system resulted in in-state hospitals on the average receiving approximately ninety-five percent of their costs in treating a Pennsylvania medicaid recipient, but WVUH is reimbursed only about fifty-four percent. Now, even if we were to conclude that it is not per se arbitrary and capricious to reimburse out-of-state hospitals on the basis of a flat in-state hospital average, or to reimburse out-of-state hospitals on a different (and presumably, here, lower) scale for capital costs, or not to reimburse them their DME costs at all, there still seems to be something seriously wrong with this reimbursement system. Can the zone of reasonableness possibly be so large as to encompass percentages of cost reimbursement for Pennsylvania medicaid recipients ranging from fifty-four to ninety-five?

The HCFA, in declining to define certain statutory terms, stated that "the State's methods and standards implicitly act as the State's definition of an efficiently and economically operated facility." 48 Fed. Reg. 56,046, 56,049 (Dec. 19, 1983). To some extent, the same is true of the term "reasonable and adequate." Pennsylvania, by virtue of the federal statute and regulations, holds its in-state program out as reasonably and adequately reimbursing efficiently operated hospitals. At the same time, however, Pennsylvania impliedly makes the same assertion with respect to its fifty-four percent reimbursement of medicaid costs incurred by an out-of-state tertiary hospital. Our role is to determine whether Pennsylvania can nonarbitrarily make that assertion.

In the face of such great disparity in the reimbursement rates between its in-state hospitals and WVUH, Pennsylvania must show a rational basis for its medicaid reimbursement program. As other courts have explained, a "state must articulate a 'rational connection between the facts found and the choice made.'" Colorado Health Care Ass'n, 842 F.2d at 1167 (quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462

U.S. 87, 105 (1983)). Pennsylvania, we conclude, wholly fails to offer such a rational basis.

Pennsylvania's preference of its own hospitals does not justify undercompensating out-of-state hospitals that are serving Pennsylvania patients under a federal program. The State is not merely exercising discretion in how to spend its own money; medicaid funds derive in large part from the federal government. Nothing in Title XIX remotely suggests that a state may use federal funds to give its own hospitals preferential treatment and, at the same time, disadvantage out-of-state hospitals. In establishing the new federal standards for hospital reimbursement rates in section 1396(a)(13)(A), OBRA's legislative history notes that although the Committee recognized that the current economic constraints and need of reductions in federal funds for medicaid requires that states be given the flexibility necessary to improve the medicaid reimbursement mechanism, "the Committee does not want such policies to result in arbitrary and unduly low reimbursement levels for hospital services." H.R. Rep. No. 158, 97th Cong., 1st Sess. 293-94 (1981). Nothing in section 1396(a) speaks in terms of a dichotomy in rate reimbursement built on state boundary lines; it nowhere suggests that state boundary lines act as points of demarcation in reimbursement for the delivery of health care. Under the federal regulations, supra at n. 6, state boundary lines, except for administrative responsibility, bear an insignificant role, if any, with respect to the actual delivery of health care in a program designed on a national level to aid the poor in a highly mobile society.

Moreover, Pennsylvania's excuse of administrative burden does not, in this case, provide a rational basis for WVUH's grossly diminished reimbursement rates. Pennsylvania argues that it would be too time and resource consuming to account for the characteristics and costs of out-of-state hospitals, and that deriving flat rates from the universe of in-state hospitals and applying them to out-of-state hospitals provides a reasonable

solution. Although this argument may become valid at some point, it is not valid in this case. WVUH undisputedly is the largest out-of-state provider of health care to Pennsylvania medicaid patients. It serves more of these Pennsylvania patients than over half of the Pennsylvania hospitals. Although we do not suggest that audits and calculations be made for all out-of-state hospitals, the retrieval and evaluation of relevant information from WVUH, and other significant out-of-state providers,[8] would not pose any particular administrative burden. It is simply irrational and arbitrary, not too mention patently unfair, to refuse to do so when the result is a system that various so wildly in its reimbursement rates for hospitals whose "[m]edical services are needed," 42 C.F.R. § 431.52(b), to serve Pennsylvanians. We therefore conclude that the Pennsylvania medicaid program as it applies to WVUH is violative of federal law because it fails to meet the reasonable and adequate requirement of section 1396a(a)(13)(A).

We neither hold nor suggest that Pennsylvania must apply precisely the same methodology to WVUH and other out-of-state hospitals as it does for its in-state hospitals if there is a rational basis for a departure. The methodology applied, however, must be rational, not arbitrary or whimsical. Nor do we suggest that Pennsylvania is precluded from formulating an acceptable reimbursement system to out-of-state hospitals without empirical evidence concerning their historical costs of operation so long as its reimbursement rates fall within the range of "rates reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities."

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8 The district court found that Pennsylvania could audit 75-100 more hospitals each year without increasing its audit staff.

Finally, although not necessary to the outcome of the case given the preceding discussion, we hold that in addition to the substantive provisions Pennsylvania violated the procedural requirements of Title XIX. The three federal provisions discussed above contain both a procedural and a substantive dimension. The procedural dimension is explicit in the federal regulations implementing section 1396a(a)(13)(A). These federal regulations condition HCFA approval of a new state plan on the state's assurances that it has complied with the regulatory requirements. 42 C.F.R. § 447.253 (1988). One of these regulatory requirements is that the State make findings in support of its change in medicaid plan. Essentially, the State is required to find that its new plan complies with the three substantive requirements discussed above. Section 447.253(b) of the HCFA regulations provides:

> (b) Findings. Whenever the Medicaid agency makes a change in its methods and standards, but not less often than annually, the agency must make the following findings:
>
> (1) Payment rates. (i) The Medicaid agency pays for inpatient hospital services and long-term care facility services through the use of rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers to provide services in conformity with applicable State and Federal laws, regulations, and quality and safety standards.
>
> (ii) With respect to inpatient hospital services --
>
> (A) The methods and standards used to determine payment rates take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs; [and]
>
> * * * *
>
> (C) The payment rates are adequate to assure that recipients have reasonable access, taking into account geographic location and reasonable travel time, to inpatient hospital services of adequate quality.

42 C.F.R. § 447.253(b) (1988).

In structuring its out-of-state reimbursement program, Pennsylvania admits to gathering no information with respect to these hospitals' actual costs. No empirical analysis was conducted to measure the effects of the reimbursement program on out-of-state hospitals. Pennsylvania did not even identify its large out-of-state providers. Federal law is not satisfied if a state merely makes conceptual policy decisions. A policy predicated upon provincialism and self-interest, now upon findings of reasonableness and adequacy, is unacceptable. We hold that the federal regulations unambiguously require the State to make findings, and in so doing they do not distinguish between out-of-state and in-state hospitals. In failing to make these requisite findings, Pennsylvania violated federal law.[9]

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9 The district court held that Pennsylvania's out-of-state reimbursement program violated not only Title XIX, but also the equal protection rights of WVUH guaranteed by the fourteenth amendment. Although we have serious reservations concerning this treatment of the equal protection rights issue by the district court, we dispose of this case on statutory grounds and therefore see no need to reach the constitutional issue.

V. THE VALIDITY OF THE ADMINISTRATIVE APPEALS SYSTEM

Our last inquiry with respect to Pennsylvania's medicaid program is whether the district court correctly concluded that the program's administrative appeals system is legally inadequate. For our answer, we must again look to section 1396a and its implementing regulations to ascertain whether Pennsylvania comports with federal law.

Title XIX requires states participating in the medicaid program to institute an appeals procedure by which providers may challenge their payment rates. 42 U.S.C. 1396a(a)(37) (West Supp. 1989); 42 C.F.R. § 447.253(c). The federal regulation states:

> Provider appeals. The Medicaid agency must provide an appeals or exception procedure that allows individual providers an opportunity to submit additional evidence and receive prompt administrative review, with respect to such issues as the agency determines appropriate, of payment rates.

42 C.F.R. § 447.253(c). It is undisputed that, at least at the hearing level, Pennsylvania's appeals procedure allows providers to challenge their payment rates on the ground of the application of the state's reimbursement methodology; it does not allow providers to challenge the validity of the methodology itself. See 701 F. Supp. at 510 (finding of fact # 197). The district court, after review of the federal regulation and the relevant legislative history, held that this procedure was insufficient.

Our review of the federal law, however, leads us to conclude otherwise. On September 30, 1981, the HCFA published interim final regulations. 46 Fed. Reg. 47964-47973. Because "individual facility rates will not receive Federal review under the revised

regulations," the HCFA required in one of its regulations that states participating in the medicaid program develop an appeals procedure by which individual facilities could request review and adjustment of their rates. The regulation stated:

> The agency must provide an appeals procedure that allows individual providers an opportunity to submit additional evidence and request prompt administrative review of payment rates.

Fed. Reg. p. 47972. The HCFA noted, however, that it was open to suggestions on how best to guarantee review of payment rates and it invited comments on its provider appeals regulations.

Some two years later, the HCFA reviewed the comments it received and promulgated the final regulation quoted above. In its accompanying commentary, the HCFA rejected suggestions that it establish minimum criteria defining the scope of review of payment rates. The agency wrote:

> We also believe that establishing minimum criteria for appeals and penalty clauses for frivolous appeals in the regulation would be contrary to the statutory intent allowing States greater flexibility in developing more cost effective reimbursement systems. Moreover, the States, not the Federal government, are in the best position to determine the administrative process that would best meet their needs and be most compatible with their reimbursement system. However, States are free to establish reasonable criteria for appeals to limit the issues on appeal that may be appropriate or to adopt other procedures to prevent frivolous appeals.

48 Fed. Reg. 56046, 56052 (Dec. 19, 1983). Consistent with the hands-off philosophy reflected in this commentary, the HCFA rewrote the appeals regulation to require an appeals procedure

for payment rates "with respect to such issues as the agency determines appropriate." 42 C.F.R. § 447.253(c).

We believe that this permissive language giving the agency greater authority to select the issues for determination permits the state agency to reject review of challenges to the validity of its methodology in its administrative appeals system. In the situation of a uniform rate, which describes Pennsylvania's reimbursement of out-of-state hospitals, such a limited appeals system may not seem the best approach. See Mary Washington Hosp., Inc. v. Fisher, 635 F. Supp. 891, 903 (E.D. Va. 1985) (observing that "the more general the rate-setting system is, the stronger the need for some appropriate method of accommodating particular situations that the general rules do not adequately address."). However, we conclude that the language of the federal regulation, in keeping with the federal policy to contain health costs and give states great flexibility in the administering of medicaid, reserves to the judgment of the states the decision whether to allow challenges to the validity of the methodology at the administrative level.

By so holding, we do not mean to imply that the language licenses the states to virtually eliminate all appeals by choosing to deem no issues appropriate for appeal. Implicit in the regulation is, we believe, a requirement that at least correct calculation of the payment rate is a mandatory issue for appeal. In this respect, it is significant that the HCFA rejected a suggestion that the appeals process requirement be waived in states adopting uniform statewide reimbursement rates. 48 Fed. Reg. 56052. By requiring an appeals procedure even in that situation, the regulation appears to contemplate that at least some issue is appealable, and the logical conclusion is that the essential and dominant appealable issue is rate calculation. Pennsylvania allows appeals by providers pursuant to 1 Pa. Code §§ 35.1-35.251. Canonsburg Gen. Hosp. v. Department of Health, 422 A.2d 141 (1980). Appeals raising the incorrect calculation of the rate may be appealed from a hearing officer's determination to the Director of OHA or the Secretary of the Department and then to the

Commonwealth Court. See Northwestern Inst. of Psychiatry v. Commonwealth, 513 A.2d 495, 498 (Pa. Commw. 1986); Grand Oak Nursing Home v. Commonwealth, 541 A.2d 800, 802 (Pa. Commw. 1986).

We conclude that the federal regulation requires no more of the State's appeals procedure than Pennsylvania offers. We reserve therefore the district court's judgment invalidating Pennsylvania's appeals system.[10]

VI. EXPERT WITNESS FEES UNDER 42 U.S.C. § 1988

After its decision on the merits, the district court in an exercise of its discretion under 42 U.S.C. § 1988[11] awarded attorneys fees to WVUH as the prevailing party in a section 1983

10 In light of our disposition with respect to the administrative appeals procedure, we have no cause to consider the eleventh amendment issue raised in the district court and pursued on appeal. The district court's judment ordering Pennsylvania to revise its appeals procedure and to apply it to WVUH for reimbursement claims dating from the commencement of this action raised serious eleventh amendment concerns about whether this remedy was retroactive relief unavailable against the state in federal court. Because we uphold the appeals system and issue only prospective relief from the day of judgment, the eleventh amendment is not implicated by our decision.

11 Section 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of [section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonably attorney's fee as part of the costs.

42 U.S.C.A. § 1988 (West 1981).

action. Following the parties' joint proposal on the amount of fees, the court awarded the Hospital $500,000. Of this amount $350,000 was allocated to attorneys fees, $45,867 to disbursements, and $104,133 to expert witness fees. The defendants unsuccessfully contested the award of expert witness fees before the district court, arguing that such fees are statutorily limited to thirty dollars a day by 28 U.S.C. § 1821(b). On appeal the defendants do not challenge an award of expert witness fees in general, but they do renew their argument that the amount of expert witness fees improperly exceeded the statutory maximum.

The defendants' argument rests on the Supreme Court's decision in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). In Crawford Fitting the Court held that a federal court taxing expert witness fees as costs under Fed. R. Civ. P. 54(d) could not exceed the statutory maximum of thirty dollars a day contained in 28 U.S.C. § 1821(b). The statutory framework underlying that decision is as follows. Rule 54(d) provides that costs shall be taxed against the losing party unless the court otherwise directs. The modern day codification of the 1853 Fee Act, 28 U.S.C. § 1920, in turn enumerates the various costs that may be assessed against a party, and these costs include "[f]ees and disbursements for printing and witnesses." Another statute, 28

U.S.C. § 1821(b), sets the amount of compensation to be paid witnesses at thirty dollars a day.[12]

The petitioners in Crawford Fitting, argued that federal courts had discretion under Rule 54(d) to award costs above and beyond those listed in section 1920 and in excess of the amount provided in section 1821. The Court rejected petitioners' contention, concluding that their view of Rule 54(d) as authorizing courts to decide what is taxable as a cost would render section 1920 superfluous. 437 U.S. at 441. Thus, because section 1920 listed witness fees as a taxable cost, and because section 1821(b) authorized witness compensation of only thirty dollars a day, the Court held that expert witness fees taxed as costs against the losing party under Rule 54(d) could not exceed section 1821(b)'s statutory cap. 437 U.S. at 445.

The defendants ask us to apply Crawford Fitting to expert witness fees awarded as part of an attorneys fee under 48 U.S.C. § 1988. They assert that the broad ruling of Crawford Fitting precludes awarding of expert witness fees in excess of thirty

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12 Section 1821 provides in relevant part:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
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> ***
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> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance . . . .

28 U.S.C.A. § 1821 (West Supp. 1989).

dollars a day, even though those fees are assessed as part of an attorneys fee under the fee-shifting statute of section 1988 rather than as a run-of-the-mill cost taxed as of course in favor of the prevailing party under Rule 54(d). The Hospital, on the other hand, argues that Crawford Fitting's reach does not extend to section 1988, and that expert witness fees assessed under that section are not subject to a statutory cap.

Section 1988 is a statutory exception to the general American Rule disallowing shifting of attorneys fees. Applicable in civil rights cases, the statute states that a court may award to the prevailing party "a reasonable attorney's fee as part of the costs." In construing section 1988, courts developed the general principle that incidental expenses incurred by the attorney, and not usually absorbed as overhead but rather charged to the client, may be included as part of an "attorney's fee" under section 1988. See Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553, 592-94 (gathering cases).

Depending on the law of the circuit, the "expenses" allowable as part of an attorneys fee have sometimes included expert witness fees. See Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983) (expert witness fees reimbursable under section 1988 if "reasonably necessary" to case); Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984) (expenses of litigation "distinct from either statutory costs or the costs of the lawyer's time reflected in his hourly billing rates," including expert witness fees, are part of attorneys fee under section 1988). But see Wheeler v. Durham City Bd. of Educ., 585 F.2d 618, 624 (4th Cir. 1978) (fees of expert witnesses "are traditionally not regarded as attorney's fees," however essential their services to the successful preparation and trial of a complex case). In our own circuit, we have followed the rule, not limited to civil rights cases but certainly applicable in a section 1988 case, that a district court has the equitable discretion to award expert witness fees in excess of the section 1821 statutory amount if "the expert's testimony is indispensable to determination of the case." See Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201, 206 (3d Cir. 1981); see also Rank v. Balshy, 590 F. Supp. 787, 801 (M.D. Pa. 1984) (expert witness fees allowable as part of attorneys fee under section 1988 in excess of thirty dollars a day).

The Hospital and the defendants stipulated that WVUH's experts were indispensable to the case, and the district court independently expressed its heavy reliance on their testimony. Under the rule in this circuit, WVUH normally would be entitled to expert witness fees in excess of the statutory maximum. The issue before us, however, is whether Crawford Fitting repudiates the previous law with respect to enhanced awards of expert witness fees under section 1988.

The Hospital argues, and the district court agreed, that Crawford Fitting does not apply to fees awarded under section 1988. The argument has much merit. Justice Blackmun, concurring in Crawford Fitting, and Justices Marshall and Brennan, dissenting, all emphasized that the Court in that case did not reach the question whether a court may award excess expert witness fees under section 1988. 482 U.S. at 445 (Blackmun, J., concurring); id. at 446 n. 1 (Marshall, J., dissenting). Moreover, the policy underlying section 1988, that of making the prevailing party whole, would suggest that the rule of cost taxation embodied in Crawford Fitting should not apply in the context of attorneys fee shifting in civil rights actions. In his strong concurrence in International Woodworkers v. Champion Int'l. Corp., 790 F.2d 1174, 1181-1193 (5th Cir. 1986), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). Judge Rubin makes the forceful argument that based on the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, Congress intended to treat expert witness fees like all other litigation expenses and include them as part of the attorneys fee awardable under section 1988.

Indeed, a number of courts examining the question raised here have concluded that Crawford Fitting does not limit expert witness fees awards under section 1988 to the rate set in section 1821(b).[13]

On the other hand, the broad language of Crawford Fitting strongly suggests that we reach the opposite conclusion. Although on its facts a Rule 54(d) case, the substance and reasoning in Crawford Fitting seems to dictate that, even in the case of a fee shifting statute such as section 1988, a court may not award fees in excess of the statutory maximum of thirty dollars a day unless the fee shifting statute expressly makes such an allowance. The Court wrote that it "will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees." 482 U.S. at 445. Moreover, the Court plainly expressed its disfavor for "[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in sections §§ 1920 and 1821 without plain evidence of congressional intent to supersede that section." Id. at 445.

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13 See Sapanajin v. Gunter, 857 F.2d 463, 465 (8th Cir. 1988) (holding that because expert witness fee award was not made as a taxation of costs under section 1821 but as an expense under section 1988, the cap on fees set out in Crawford Fitting does not apply); Black Grievance Comm. v. Philadelphia Elec. Co., 690 F. Supp. 1393, 1403 (E.D. Pa. 1988) (same); Hillburn v. Comm'r of Conn. Dep't of Income Maintenance, 683 F. Supp. 23, 27 (D. Conn. 1987), aff'd 847 F.2d 835 (2d Cir. 1988) (same); United States v. Yonkers Bd. of Educ., 118 F.R.D. 326, 330 (S.D.N.Y. 1987) (same); cf. Mathis v. Spears, 857 F.2d 749, 758-59 (Fed. Cir. 1988) (post-Crawford case holding section 1821 inapplicable to award of expert witness expenses under fee-shifting statute pertaining to patents); Freeman v. Package Machinery Co., 865 F.2d 1331, 1346-47 (1st Cir. 1988) (although not reaching issue, strongly suggesting it would not "elongate" Crawford Fitting to apply in context of express fee shifting statute).

We believe that the recent decision of the Court in Missouri v. Jenkins, 47 U.S.L.W. 4735 (1989), in no way alters the ruling of the Court in Crawford. Unlike Crawford, which dealt with witness fees statutorily fixed by Congress as part of the costs, the Court in Jenkins dealt with a comparatively new phenomenon in the legal world, the enhancement of attorney's fees by including the fees for services of paralegals and law clerks. Their fees, however, are not regulated by statute as are witness fees. In fact, Missouri, against whom the fees were taxed, conceded "that compensation for the cost of these personnel should be included in the fee award." Id. at 4738. Missouri's argument was that section 1988 did not authorize billing paralegals at market rates, but only at their cost to the attorneys hiring them; charging market rates produced a windfall for the attorney.

We acknowledge that in this age of sophisticated litigation, in which expert witnesses play an increasingly important role, thirty dollars per day is an insignificant sum. However, we believe that we are constrained by the language of Crawford to abandon our previous rule and to limit expert witness fees to thirty dollars a day. Congress has chosen to legislate in this area and unless the statute under which expert witness fees are awarded expressly repeals the limits of sections 1920 and 1821(b), we must defer to legislative fiat. In so holding, we join with the other circuits interpreting Crawford Fitting that have arrived at the same conclusion with respect to fee-shifting statutes similar to section 1988. Denny v. Westfield State College, 58 U.S.L.W. 2077 (1st Cir. 1989) (holding in a Title VII sex discrimination case that absent some reasonably explicit indication of Congressional intent that witness fees be shifted without regard to the thirty dollars per day cap, the Crawford rule must prevail). See Glenn v. General Motors Corp., 841 F.2d 1567, 1575 (11th Cir.), cert. denied, 109 S. Ct. 378 (1988) (holding section 1821) applicable to fee-shifting provision of Equal Pay Act because "the broad language in Crawford Fitting does not permit a distinction based upon whether or not the award is made under a fee-shifting statute"); Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987), cert.

denied, 108 S. Ct. 1735 (1988), (holding section 1821 applicable to fee-shifting provision of Voting Rights Act); cf. Gilbert v. City of Little Rock, 867 F.2d 1062, 1062-63 (8th Cir. 1989), petition for cert. filed (May 20, 1989) (en banc) (affirming by an equally divided court the order of the district court awarding expert witness fees as expenses under section 1988 at the statutory rate of thirty dollars a day); Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987), cert. denied, 108 S. Ct. 1298 (1988), (stating in dicta that under Crawford Fitting "[a] prevailing party in a civil rights case is not entitled to tax such fees as costs"); see also Central Delaware Branch of NAACP v. City of Dover, 123 F.R.D. 85, 94-95 (D. Del. 1988) (awarding expert witness fees under section 1988 at statutory rate of thirty dollars a day).

We thus conclude that, under Crawford Fitting, section 1988 as presently drafted does not authorize expert fee awards in excess of the statutory cap of thirty dollars per day provided in section 1821(b). We therefore vacate the district court's judgment awarding attorneys fees insofar as it awards WVUH expert witness fees in excess of thirty dollars per day.

VII. CONCLUSION

We conclude that WVUH can assert a cause of action against the defendants under 42 U.S.C. § 1983 for violation of the federal medicaid statute and that statute does not reflect a congressional intent to foreclose private enforcement. Although states possess broad discretion in devising their hospital reimbursement plans under the medicaid statute, we hold that overall the Pennsylvania medicaid program as it applies to WVUH violates federal law because it fails to meet the disproportionate share and the reasonable and adequate requirements of section 1396(a)(13)(A) and the procedural provisions of Title XIX.

As for Pennsylvania's administrative appeals system, we conclude that it sufficiently satisfies Title XIX and the

implementing federal regulation. Finally, the district court's award of expert fees in excess of thirty dollars per day exceeded federal statutory provisions.

Accordingly, the judgment of the district court declaring the Commonwealth of Pennsylvania's medicaid prospective system as it applies to WVUH in violation of federal law will be affirmed as well as its order directing the defendants to formulate a methodology within ninety days from the day of judgment for its medicaid prospective payment system for WVUH consistent with and in conformity with federal law. Reimbursement to WVUH under a prospective payment system that conforms to federal law will commence with the date of the district court's initial judgment in this matter. The judgment of the district court declaring Pennsylvania's administrative appeals system as it applies to WVUH in violation of federal law will be reversed. The judgment of the district court with respect to attorney's fees will be vacated insofar as it grants expert witness fees in excess of thirty dollars per day.

Two-thirds of WVUH's costs on appeal will be taxed against the appellants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,	)	
Plaintiff	)	
	)	CIVIL ACTION NO. 86-0955
v.	)	
ROBERT CASEY, Governor, et al.,	)	
Defendants	)	

MEMORANDUM

Background

West Virginia University Hospitals, Inc. (WVUH or the Hospital) commenced this action against the Commonwealth of Pennsylvania's Department of Public Welfare and individuals on July 26, 1986. Pursuant to stipulation, the Department of Public Welfare was dismissed as a defendant on February 25, 1987. WVUH brought this action under 42 U.S.C. section 1983 alleging Pennsylvania's medicaid reimbursement program for out-of-state hospitals violates federal payment standards and violates the equal protection clause of the fourteenth amendment of the United States Constitution. Plaintiff further alleges Pennsylvania's administrative appeals system for out-of-state hospitals is legally inadequate. The Hospital seeks injunctive and declaratory relief regarding its past treatment under Pennsylvania's reimbursement program and administrative appeals system. The trial in this action took place before the court on May 2, 3, 4, 5, 6, and 16, 1988. The parties have been given an opportunity to present arguments and proposed findings of fact and conclusions of law. The opinion of the court follows.

Findings of Fact

In accordance with Federal Rule of Civil Procedure 52(a) the court finds the following facts.

I. The Parties

1. WVUH is a non-stock, non-profit corporation organized under the laws of West Virginia. Plaintiff's Pretrial Memorandum Undisputed Facts No. 1. (Hereinafter referred to as "Facts.")

2. Defendant Robert P. Casey is the Governor of the Commonwealth of Pennsylvania. Facts 2.

3. The Secretary of the Department of Public Welfare (the Secretary) of Pennsylvania was Walter C. Cohen at the time this action was filed. The Secretary is now John F. White, Jr. Facts 3.

4. The Secretary reports to the Governor of Pennsylvania. The Secretary is responsible for implementing, administering and operating the medicaid program in Pennsylvania. The Medicaid program in Pennsylvania is called the "Medicaid Assistance Program" (MAP). Facts 4.

5. Since November, 1987, David S. Feinberg has been Acting Director of the proposed Office of Hospital and Outpatient Programs in the Department of Public Welfare (the Department or DPW). From 1979 to November, 1987, Feinberg was the Director of the Bureau of Policy and Program Development. Facts 5.

Feinberg was responsible for the development of Pennsylvania's medicaid program's prospective payment system. Facts 6.

II. The Hospital

7. WVUH is located six miles south of the border between the State of West Virginia and the Commonwealth of Pennsylvania. Facts 10.

8. The primary service area of the Hospital includes the West Virginia counties of Monongahela, Marion, Harrison, Taylor, Doddridge and Preston and the Pennsylvania counties of Fayette and Greene. Facts 11.

9. Generally, Pennsylvania residents constitute approximately 16% of all WVUH inpatient admissions. Testimony of Katherine Douglass, Transcript[1] at 163, lines 6, 15-17.

10. In 1985, 2,500 inpatient admissions to WVUH were attributable to Pennsylvania residents. 860 of the admissions were Pennsylvania medicaid recipients. Testimony of Katherine Douglass, Transcript at 163, lines 15-20.

11. Approximately 204,000 people lived in Fayette and Greene counties in the mid-1980s. By the late 1980s, the population in Fayette and Greene counties is projected to grow to 209,000 people. Testimony of Katherine Douglass, Transcript at 158, lines 20-25.

12. 1,200 persons from Fayette County received inpatient care at WVUH in 1985; 1,100 persons from Greene County received

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1 Citations to "Transcript" refer to the trial transcript. Because some trial testimony was transcribed on an expedited basis during trial, citations to that testimony will be, for example, "May 4, 5, and 6, 1988 Transcript." Deposition testimony will be cited similarly i.e., "December 28, 1986 Vertrees Deposition."

inpatient care. Testimony of Katherine Douglas, Transcript at 163, lines 21-25; 164, lines 1-7.

The Hospital also serves patients from Washington County, Pennsylvania. In calendar year 1985 the Hospital had 102 Pennsylvania medicaid admissions from Washington County, Pennsylvania. Facts 14.

Services Provided

14. A "tertiary care" hospital is a hospital that provides a level of hospital and medical services that is inherently more complex and that is generally not provided in small or community hospitals. Testimony of Bernard Westfall, Transcript at 33, lines 2-25; 34, lines 1-25; 35 lines 1-15.

15. WVUH is the closest source of tertiary care services to many individuals living in Greene and Fayette counties. Testimony of Katherine Douglass, Transcript at 159, lines 11-25; 160-161; 162, lines 1-24.

16. Some Pennsylvania medicaid recipients who reside in Fayette, Greene and parts of Washington counties, and who must use the Hospital for complex or specialized medical services, otherwise must travel 20 to 70 additional miles to Pittsburgh, Pennsylvania, the next closest city (to the Hospital) in which such services are offered. Facts 16.

17. Specialized or complex inpatient services available at the Hospital which are not available in the Pennsylvania hospitals in Fayette, Greene, and Washington counties include cardiac catheterization, angiography, open heart surgery, high risk obstetrics, neonatal intensive care, kidney transplant lithotripsy. Testimony of Katherine Douglass, Transcript at 159, lines 16-25; 160, lines 1-25; 161, lines 1-25; 162, lines 1-25; 163, lines 1-25; 164, lines 1-25; 165, lines 1-25; 166, lines 1-3. Facts 17.

18. WVUH is a Level I trauma center equipped to deal with head and spine injuries as well as cardiac and other emergencies. It is the only Level I trauma center in the service area of WVUH. The next closest Level I trauma center is located in Pittsburgh. Testimony of Katherine Douglass, Transcript at 160, lines 11-25; 161, lines 1-5.

19. WVUH provides an extensive prenatal referral system for high risk neonates and, as apart of that system, provides high risk prenatal services to hospitals in the service area, including Greene County Memorial Hospital located in Greene County, Pennsylvania. Testimony of Katherine Douglass, Transcript at 161, lines 6-25; 162, lines 1-24.

20. WVUH also provides specialized outpatient services to Pennsylvania residents. These services include pediatric cardiology, pediatric neurology, neurosurgery, and other highly technical types of care. Testimony of Katherine Douglass, Transcript at 165, lines 16-22.

21. The outpatient services identified in the paragraph above are not available at hospitals located in Fayette and Greene counties. If patients did not use WVUH for such services, the next closest hospital would be located in Pittsburgh. Testimony of Katherine Douglass, Transcript at 165, lines 23-25; 166, lines 1-3.

22. WVUH also provides Pennsylvania residents with routine hospital care such as routine obstetrics, normal newborn care and tonsillectomies. Defendants' Exhibit 76.

23. The types of routine cases seen at WVUH are similar to the routine types of cases seen at most university teaching hospitals. Testimony of James Vertrees, Transcript at 77, lines 8-14.

24. WVUH has approximately the same Case Mix Index (CMI) as university teaching hospitals located in Pennsylvania and other similarly situated hospitals. Plaintiff's Exhibit 66.

WVUH is a University Affiliated Teaching Hospital

25. The Hospital is a university affiliated teaching hospital: the West Virginia University uses the Hospital to train health professionals. Facts 39.

26. WVUH is a major academic medical center, one of only 121 such centers in the country. Testimony of Gerard Anderson, Transcript at 392, lines 1-12.

27. 1,300 persons completed their physician and dentist residency training programs at the Hospital between 1960 and 1984. Facts 40.

28. Approximately 7% of the 1,664 total living alumni of the West Virginia University School of Medicine's four-year medical program live in Pennsylvania. Facts 47.

29. MAP recognizes that the provision of graduate medical education programs improves the quality of care at a hospital. Testimony of Gerard Anderson, Transcript at 320, lines 12-23. Plaintiff's Exhibit 8.

WVUH's Medicaid Volume

30. Historically, WVUH has provided significant numbers of Pennsylvania medicaid recipients with hospital care.

31. In Calendar year 1981, the Hospital treated 610 Pennsylvania medicaid admissions on an inpatient basis. Facts 22.

32. In calendar year 1982, the Hospital treated 692 Pennsylvania medicaid admissions on an inpatient basis. Facts 23.

33. In calendar year 1983, the Hospital treated 783 Pennsylvania medicaid admissions on an inpatient basis. Facts 24.

34. In calendar year 1984, the Hospital treated 828 Pennsylvania medicaid admissions on an inpatient basis. Facts 25.

35. In calendar year 1985, the Hospital treated 853 Pennsylvania medicaid admissions on an inpatient basis. Facts 26.

36. In calendar year 1986, the Hospital treated 840 Pennsylvania medicaid admissions on an inpatient basis. Facts 27.

37. In calendar year 1987, the Hospital treated 552 Pennsylvania medicaid admissions from the period January 1 through September 30, 1987. Facts 28.

38. The number of patients identified in paragraphs 31 through 37 above does not include the number of Pennsylvania medicaid recipients who utilized the outpatient services of the Hospital. Facts 29.

39. The annual number of outpatient visits at the Hospital attributable to Pennsylvania medicaid recipients ranges from 7,000 to 7,500. Facts 30.

40. Pennsylvania medicaid recipients residing in Fayette, Greene, and Washington counties have "freedom of choice" in selecting their medical care providers. This means absent special rules, (none of which are applicable to this case), Pennsylvania recipients of medicaid may use the services of any hospital they choose. Testimony of David Feinberg, May 4, 5, and 6, 1988 Transcript at 124, lines 22-25; 125, lines 1-25; 126, lines 1-25; 127, lines 1-21.

41. Some Pennsylvania residents, including Pennsylvania medicaid recipients, living in the counties of Fayette, Greene, and

Washington desire and require access to the Hospital's services and facilities. Facts 32.

42. In fiscal years 1984-85, 1985-86 and 1986-87, WVUH provided inpatient hospital care to more Pennsylvania medicaid patients than over one-half of the hospitals located in Pennsylvania. Testimony of Thomas Manak, Transcript at 251, lines 8-25; 252, lines 1-7. Plaintiff's Exhibit 51(a).

43. Five percent of all WVUH inpatient admissions are attributable to Pennsylvania medicaid recipients. Testimony of Stephen Pickett, Transcript at 170, lines 12-13; 175, lines 18-20.

44. In addition to serving Pennsylvania recipients, the Hospital served the following numbers of West Virginia medicaid admissions on an inpatient basis:

July 1, 1982 - June 30, 1983	2,049
July 1, 1983 - June 30, 1984	2,261
July 1, 1984 - December 31, 1984	1,181
Calendar Year 1985	2,319
Calendar Year 1986	1,848
January 1, 1987 - October 31, 1987	1,618

45. Twenty-three percent of all WVUH inpatient admissions are recipients of medicaid. Testimony of Stephen Pickett, Transcript at 170, lines 8-9.

46. Seventeen percent of all WVUH inpatient admissions are West Virginia medicaid recipients. Testimony of Stephen Pickett, Transcript at 170, lines 12, 13.

WVUH's Incorporation History

46. In 1982 the West Virginia Board of Regents commissioned a study to determine how to resolve deficiencies cited by the national accreditation board for hospitals. The West Virginia Board of Regents was advised that given the structural problems of the existing facility, it was more prudent to replace the facility than to renovate it. Testimony of Bernard Westfall, Transcript at 49, lines 22-25; 50, lines 1-25; 51, lines 1-25; 52, lines 1-19.

48. The West Virginia legislature concurred. See 18-11C-2(c) of the Code of West Virginia.

49. The entity that the legislature created to operate the facility is WVUH. Testimony of Bernard Westfall, Transcript at 59, lines 18-20.

50. WVUH and its predecessor entity, West Virginia University Hospital, are the same. They are both creatures of the West Virginia legislature and subject to its control. The legislature simply changed the form of the hospital organization. Testimony of Bernard Westfall, Transcript at 142, lines 12-25.

51. The West Virginia legislature has never relinquished ownership of the Hospital's assets and control. Plaintiff's Exhibit 71. See 18-11C-3 of the Code of West Virginia.

52. The change from West Virginia University Hospital to WVUH was a change in the form of organization, not a change of ownership or control. Testimony of Bernard Westfall, Transcript at 142, lines 12-25; 688, lines 3-13; 690, lines 5-25; 691, lines 1-7.

The Provider Agreement with MAP

53. West Virginia University Hospital, the predecessor entity to WVUH, entered into an agreement with the Pennsylvania Medicaid Assistance Program. Defendants' Exhibit 35.

54. The provider agreement, which was not dated, is self-perpetuating unless terminated. Defendants' Exhibit 35.

55. The defendants have never terminated the provider agreement. Testimony of Donna Hoffmaster, Transcript at 482, lines 6-9.

56. MAP has reimbursed WVUH for inpatient services provided to Pennsylvania medicaid patients without interruption, except for one seven week interruption beginning in December, 1987. The reason for withholding payment was due to an alleged failure to report a change in ownership. Testimony of Amy Leopard, May 3, 1988, Transcript at 7, lines 3-25; 8, lines 1-25; 9, lines 1-25; 10, lines 1-13; Plaintiff's Exhibit 67; letter dated December 2, 1987 from Virginia Antonoplos.

57. The payments were interrupted and withheld after MAP employees consulted with counsel for MAP. The interruption of payments was related to this litigation. Testimony of Amy Leopard, May 3, 1988 Transcript at 13, lines 9-21.

58. The defendants offered no evidence demonstrating a change in West Virginia University Hospital's ownership. Defendants testified only that they were aware that WVUH uses a tax payer identification number for its short procedure unit (not related to inpatient care) that is different from some other numbers utilized by WVUH. Testimony of Donna Hoffmaster, Transcript at 477, lines 16-25; 478, lines 1-12.

III. Pennsylvania Medicaid Program Reimbursement of In-State Hospitals

The Nature of the Medicaid Program

59. Medicaid is a federal-state program that pays for medical services provided to the eligible poor in accordance with Title XIX of the Social Security Act and the applicable state and federal regulations. Facts 55, 57.

60. The state designs and administers the medicaid program within the broad parameters established by Title XIX of the Social Security Act, implementing federal regulations, and the applicable state laws and regulations. Facts 57.

61. Medicaid is a different program than Medicare. Medicare is a program of health insurance administered by the federal government. Facts 58.

62. The Commonwealth of Pennsylvania participates with the federal government in providing a medicaid program to eligible Pennsylvania residents. Facts 59.

63. As a part of its agreement with the federal government to participate in medicaid, the defendants submitted a state plan for medical assistance to the United States Secretary of Health and Human Services for approval. Facts 60.

64. Pennsylvania's state plan for medical assistance has been approved by the United States Secretary of Health and Human Services, including the Pennsylvania state plan provisions that govern reimbursement of general acute care hospitals which provide health care services to Pennsylvania medicaid recipients. Facts 61.

The Change From Retrospective "Reasonable Cost" Reimbursement to Prospective Reimbursement

65. Prior to 1981, the Social Security Act required states to pay hospitals the "reasonable cost" of rendering inpatient hospital services to medicaid recipients. Facts 62.

66. "Reasonable cost" was a term defined and used in the medicare program and adopted for use in the medicaid program. Facts 63.

67. As a general rule, the "reasonable cost" standard of reimbursement meant that states were required to reimburse hospitals their actual, allowable costs (capital costs and operating costs) of the care provided to medicaid recipients. Facts 64.

68. "Reasonable cost" reimbursement was a retrospective form of reimbursement, involving the payment of interim rates during the fiscal year with an end-of-year cost settlement once a hospital reported its claimed actual, allowable medicaid costs. A hospital's reported costs were generally subject to audit. Facts 65.

69. On July 31, 1981, the United States Congress enacted the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35 (OBRA), which changed the requirement that state medicaid programs reimburse hospitals the "reasonable" cost of providing services. Facts 66.

70. Effective for fiscal year 1984-1985, the Commonwealth of Pennsylvania replaced the reasonable cost system of reimbursement for acute care inpatient services in hospitals in the medicaid program. Facts 72.

71. In place of the reasonable cost standard Pennsylvania adopted a "prospective payment system" for acute care inpatient services in hospitals. Facts 73.

72. Under a prospective payment system of reimbursement a hospital is told in advance what its payment will be for specified services. Facts 74.

73. The Pennsylvania prospective payment system was designed, in part, to implement the OBRA standard and to contain the rising cost of health care. Facts 75.

74. One of the goals of Pennsylvania's system of prospective payment is to provide hospitals with the incentive to become more efficient and economical by providing them a fixed amount of reimbursement for each case regardless of the provider's actual costs of treating those cases. Facts 76.

In-State Hospital Reimbursement of Operating Costs Of Inpatient Care Under The MAP Prospective Payment System Grouping

75. Under Pennsylvania's medicaid prospective payment system of reimbursement, all participating in-state hospitals were separated into seven groups, excluding children's hospitals. Facts 78.

76. The purpose of the grouping system was to place hospitals with similar roles and potential for costs in the same group. December 28, 1988 Deposition of James Vertrees at 35, lines 4-13; 53, lines 11-21. Defendants' Exhibit 2 at 2198.

77. The underlying assumption was that similar hospitals have similar costs and that reimbursement of the average cost of similarly situated hospitals would be an equitable means of payment. Testimony of Thomas Manak, Transcript at 213, lines 14-17.

78. Pennsylvania used a complex formula to identify the similarities among hospitals. Testimony of Thomas Manak, Transcript at 213, lines 18-19.

79. Pennsylvania's groupings for in-state hospitals take into account four concepts: each hospital's teaching status, its medicaid volume, its environmental characteristics, and its hospital costs. Facts 80.

80. Teaching status, medicaid volume, environmental characteristics, and hospital costs are measured by a total of thirteen variables. Facts 81.

81. The variables consist of, inter alia, the number of interns and resident programs, medicaid volume, area wage index, and total patients seen at the hospital. Testimony of Thomas Manak, Transcript at 214, lines 15-17.

82. The actual grouping of in-state hospitals is done by computer program after inputting each in-state hospital's data for the thirteen variables. Facts 82.

83. MAP has placed all in-state academic medical centers in Group I. Testimony of Kelly Grotzinger, Transcript at 60, lines 21-25; 602, lines 8-10.

Group Average Cost Per Case

84. After all in-state hospitals were grouped into seven groups by the computer, Pennsylvania determined a group average cost per case. This group average cost per case is ultimately used to determine the prospective payment. Facts 83.

85. To ascertain the group average cost per case for each of the groups of in-state hospitals for fiscal years 84-85, 85-86 and 86-87, the defendants identified each hospital's reported Pennsylvania medicaid reimbursable costs for the most recently completed fiscal year, subtracting certain costs specified in the state plan and applicable regulations. Facts 84.

86. The in-state hospital's costs were then divided by the number of Pennsylvania medicaid cases on paid claims history for that in-state hospital for that year. Facts 85.

87. The resulting figure was that particular in-state hospital's average cost per case for the fiscal year from which the cost information was derived. Facts 86.

88. The average cost per case for the hospital was then standardized by a hospital-specific case mix index. Facts 87.

89. The defendants then determined a rate of increase for each in-state hospital's average cost per case by the particular in-state hospital's average cost per case for the preceding fiscal year. Facts 88.

90. The defendants then adjusted the in-state hospital's average cost per case by an inflation rate, if the rate of increase was greater than the rate of inflation for the preceding fiscal year. Facts 89.

91. If the rate of increase was equal to or less than the rate of inflation, then the average cost per case was increased by one-half of the difference between the rate of increase and the rate of inflation for the preceding fiscal year. Facts 90.

92. The defendants projected the in-state hospital's average cost per case to the end of the forthcoming year by multiplying the adjusted average cost per case by a projected inflation rate for the forthcoming fiscal year. Facts 91.

93. For each group of in-state hospitals the defendants added the projected average cost per case for each in-state hospital in a given group, and divided the total by the number of hospitals in that particular group. Facts 92.

94. The resulting figure was the group average cost per case which was then adjusted for budget neutrality. This number was the group rate. Facts 93.

95. A group rate was calculated for each of the seven groups. The hospitals in Group 1 have the highest group rate. The hospitals in Group 7 have the lowest group rate. Testimony of Thomas Manak, Transcript at 220, line 25; 221, lines 1-17; 225, lines 16-24. Defendants' Exhibit 2 at 2198, 2199.

The Payment Rate for a DRG

96. To determine how much to pay a hospital for treating a patient with a given illness, MAP multiplies the relative value of the Diagnostic Related Group (DRG) assigned to the patient's illness by the hospital's group average cost per case. Testimony of Thomas Manak, Transcript at 224, lines 20-22.

97. The higher the group average cost per case, i.e., the hospital's group rate, the higher the payment for a given DRG. Thus, MAP pays a Group 1 hospital more to treat a given DRG than it pays a Group 2, 3, 4, 5, 6 or 7 hospital to treat the same DRG. Testimony of Thomas Manak, Transcript at 225, lines 16-25; 226 lines 1-3.

98. The payment amount for a given case may be adjusted for payments made by a third party payer, patient co-pay or resource obligations, or, if the case qualifies as a day or cost outlier. Facts 97.

99. Under Pennsylvania's prospective payment system, hospitals are paid a set amount per inpatient case for the hospital's operating costs based on the hospital's group rate and the applicable DRG. Facts 98.

100. The DRG system of reimbursement creates "winners" and "losers." A winner is a case where the DRG payment is

greater than the actual cost of treating a particular patient. A loser is where costs are more than the DRG payment received. Testimony of Gerard Anderson, Transcript at 314, lines 11-15.

101. On aggregate, the expectation is that over a large number of cases, in-state hospitals will be paid an appropriate amount. Testimony of Gerard Anderson, Transcript at 314, lines 24-25.

In-State Hospital Reimbursement of Direct Medical Education Costs

102. In addition to reimbursement of the inpatient operating costs for each inpatient case, MAP pays in-state hospitals an additional amount to reimburse them for their direct education medical costs, if any. Facts 101.

103. MAP reimburses in-state hospitals for their direct medical education (DME) costs in accordance with the federal medicare regulations and applicable state laws and regulations for such reimbursement. See Testimony of David Feinberg, May 4, 5, and 6, 1988 Transcript at 95, lines 3-8, 19-24; 96, lines 1-3.

104. In developing its payment system, MAP recognized that organized or planned educational activities enhance the quality of care in an institution. Plaintiff's Exhibit 8. Testimony of Gerard Anderson, Transcript at 320, lines 12-23.

105. In developing its payment system, MAP stated it wanted to fairly reimburse the legitimate costs of DME. Plaintiff's Exhibit 8.

106. The defendants concluded that reimbursement of DME costs satisfied the OBRA standard. Facts 145.

107. A hospital's direct medical education costs are largely the salaries hospitals pay to residents in approved teaching programs. Testimony of Michael Maher, Transcript at 642, lines 16-23.

108. Residents spend approximately 75% of their time providing direct patient care. Testimony of Gerard Anderson, Transcript at 321, lines 17-21.

109. MAP reimburses in-state hospitals for the MAP share of their DME costs on a "pass through" basis subject to certain limitations. Testimony of Thomas Manak, Transcript at 227, lines 14-25; 228, lines 1-2.

110. MAP has a specific line on its medicaid cost report for hospitals to report their DME costs. Testimony of Michael Maher, Transcript at 648, lines 6-12.

111. MAP reimbursed in-state hospitals for the MAP share of their DME costs in 1984-1985 and 1985-1986 on an actual cost basis subject to certain limitations. See 55 Pa. Code 1163.55. Defendants' Exhibit 2.

112. For fiscal year 1986-1987 and thereafter, MAP limits reimbursement to in-state hospitals for DME costs to 1.95% over the amount paid to the hospital in the previous year for DME costs or the hospital's allowable DME costs, whichever is less. See 55 Pa. Code 1163.55(d). Defendants' Exhibit 4.

113. In actual practice, MAP requires hospitals to claim resident salaries as part of the hospitals' cost of doing business. MAP does not give residents in approved training programs separate provider contracts. Testimony of Michael Maher, Transcript at 649, lines 19-25; 650, lines 1-18.

114. There is no provision of the Pennsylvania State Plan or other Pennsylvania rule that would permit interns and residents in approved teaching programs to bill MAP directly for their services instead of having hospitals claim their salaries as costs. Testimony of David Feinberg, May 4, 5 and 6, 1988 Transcript at 106, lines 23-25; 107, lines 1-5; 121, lines 1-16.

In-State Hospital Reimbursement of Capital Costs

115. In addition to reimbursement of the inpatient operating costs for each inpatient case and in addition to any payments for direct medical education costs, MAP reimburses in-state hospitals for their allowable capital costs. Facts 103.

116. For the period July 1, 1984 through June 30, 1986 this reimbursement for capital costs was determined for each in-state hospital by ascertaining each hospital's specific capital costs. Facts 104.

117. MAP then paid its share of the hospital's actual allowable costs on a pass-through basis. Testimony of Thomas Manak, Transcript at 227, lines 1-12.

118. For the period July 1, 1984 through June 30, 1986, the defendants found that the reimbursement of an in-state hospital's actual, allowable capital costs satisfied the OBRA standard. Facts 137.

119. After July 1, 1986, MAP initiated a prospective payment system for reimbursement of an in-state hospital's capital costs. The system will be phased in between July 1, 1986 and June 30, 1992. During this period, MAP will pay in-state hospitals for their actual capital costs on a decreasing percentage basis. After July 1, 1992, MAP will reimburse all in-state hospitals the same flat rate for their capital costs. Testimony of David Feinberg, May 4, 5 and 6, 1988 Transcript at 64, lines 6-24; 65, line 1.

The Phase-In of the Prospective Payment System for In-State Hospitals

120. The defendants adopted a three year phase-in for Pennsylvania's prospective payment system for reimbursement of each in-state hospital's operating costs. The phase-in began in fiscal year 1984-1985. Facts 105.

121. The phase-in involved blending each in-state hospital's group average cost per case with the in-state hospital's hospital specific cost per case. Facts 106.

122. In fiscal year 1984-1985, an in-state hospital's prospective payment rate was a blend of 75% of the in-state hospital's hospital-specific cost per case, after a budget neutrality adjustment, and 25% of the hospital's group average cost per case, after a budget neutrality adjustment. Facts 107.

123. In fiscal year 1985-1986, an in-state hospital's prospective payment rate was calculated by adjusting the percentages from 75%/25% to 50%/50%. Facts 108.

124. In fiscal year 1986-1987, the prospective payment rate of an in-state hospital was determined by using only that in-state hospital's group average cost per case. Facts 109.

IV. The Pennsylvania Medicaid Program: Reimbursement of Out-Of-State Hospitals

General

125. The Pennsylvania medicaid prospective payment system does not reimburse out-of-state hospitals the same way it reimburses in-state hospitals. Facts 117.

Reimbursement for Operating Costs

Grouping

126. Under the Pennsylvania prospective payment system all out-of-state hospitals are grouped together in one group -- irrespective of the differences that might exist between the hospitals, such as teaching status, medicaid volume, environment, and hospital costs. Facts 118.

127. Out-of-state hospitals are grouped using one factor only: the hospitals are not located in Pennsylvania. Facts 119.

128. By grouping all out-of-state hospitals together Pennsylvania did not put out-of-state hospitals with the potential for similar costs together. December 28, 1987 Deposition of James Vertrees at 54, lines 13-18.

129. Defendants determined as early as September 6, 1983 that the Pennsylvania medicaid prospective payment system would classify all out-of-state hospitals into one group and reimburse them for operating costs using an average in-state rate based on the statewide average cost per case. Facts 120.

130. The drafters of the MAP prospective payment system were aware that placing all out-of-state hospitals together in a group and basing their payment on an average Pennsylvania statewide cost per case was potentially inequitable for a large university medical center because teaching hospitals have extremely high costs. December 28, 1987 Deposition of James Vertrees at 54, lines 13-22. Plaintiff's Exhibit 11.

The Lack of a Factual Basis to Support the Payment Rate Used for WVUH

131. No empirical study was done with respect to out-of-state payments between the period September 6, 1983 and July 1, 1984 when the prospective system was implemented. Facts 122.

132. To reimburse inpatient operating costs of out-of-state hospitals, Pennsylvania multiplies the relative value of the DRG assigned to the patient's illness by the out-of-state group rate (based on a Pennsylvania statewide average cost per case) or the hospital's actual charges for treating that illness, whichever is lower. See 55 Pa. Code 1163.65(c).

133. In developing the reimbursement methodology for out-of-state hospitals, defendants did not look at the individual cost data for out-of-state hospitals. Facts 125.

134. Unlike the situation concerning in-state hospitals, the Pennsylvania medicaid payment rate for out-of-state hospitals has no relation to the actual costs incurred by the out-of-state hospitals in providing care to Pennsylvania medicaid recipients. Testimony of Thomas Manak, Transcript at 229, lines 4-5, 18-25; 230, lines 1-2.

135. The Pennsylvania medicaid payment rate is not sensitive to differences that may exist between out-of-state hospitals. Testimony of Thomas Manak, Transcript at 228, lines 20-24.

136. A small community hospital that is out-of-state will receive the same MAP payment for a given DRG that WVUH will receive. Facts 129.

137. MAP has no empirical analysis that validates the payment rates for out-of-state hospitals. Testimony of David Feinberg, May 4, 5, and 6, 1988 Transcript at 111, lines 6-14, 24-25; 112, line 2.

138. MAP has no factual basis for concluding that its operating cost reimbursement to WVUH is adequate and reasonable. Testimony of Gerard Anderson, Transcript at 244, lines 8-25; 345, lines 1-3, 12-20.

139. MAP defends its payment rate for out-of-state hospitals on the grounds that it was administratively too burdensome to identify and validate the costs of out-of-state hospitals. December 15, 1987 Deposition of David Feinberg at 28, lines 9-11. Testimony of David Feinberg May 4, 5, and 6, 1988 Transcript at 43, lines 4-21.

140. Few out-of-state hospitals see more than 20 MAP cases per year. Plaintiff's Exhibit 56(A). Testimony of Thomas Manak, Transcript at 257, lines 11-24.

141. WVUH is the only out-of-state hospital that serves more than 160 MAP cases. Plaintiff's Exhibit 56(A).

142. MAP did not identify its large out-of-state providers. Testimony of James Vertrees, Transcript at 550, lines 2-25; 551, lines 1-18.

143. MAP considered out-of-state reimbursement a minor, technical issue, not a substantive issue. Testimony of Robert Gallagher, Transcript at 607, lines 1-6.

144. MAP presently has the audit capacity to verify the costs of 75-100 out-of-state hospitals. Testimony of Robert Gallagher, Transcript at 607, lines 1-6.

MAP Did Not Consider Whether Out-of-State Hospitals Treat A Disproportionate Share of Low Income Persons

145. It costs more to treat low income patients and hospitals that serve a large medicaid population are "particularly dependent" on medicaid reimbursement. 48 Fed. Reg. 56048 (December 19, 1983).

146. The Pennsylvania medicaid prospective payment methodology defines a low income patient as a patient who is a Pennsylvania medicaid recipient. Testimony of Gerard Anderson, Transcript at 359, lines 22-25; 360, lines 1-12.

147. MAP considers an in-state hospital that has an 18-20% medicaid volume serves a disproportionate number of low income patients. Testimony of David Feinberg, May 4, 5, and 6, 1988 Transcript at 109, lines 1-4.

148. The out-of-state reimbursement methodology does not contain any provision with which to identify out-of-state hospitals serving a disproportionate share of low income patients and by which to reimburse those hospitals any more than other out-of-state hospitals are reimbursed. Facts 133.

149. MAP does not take into account the high volume of medicaid patients at WVUH. Testimony of Gerard Anderson, Transcript at 424, lines 10-11.

150. Adequate medicaid reimbursement is essential for hospitals that have a high volume of medical assistance patients because their medicaid payment is significant in terms of their total revenue picture. December 28, 1988 Deposition of James Vertrees at 34, lines 7-14.

151. MAP concluded that the flat average rate paid to out-of-state hospitals, if used in-state, would result in teaching hospitals not getting enough payment and smaller community hospitals getting more than they needed. MAP did not have a similar concern for out-of-state hospitals. Testimony of James Vertrees, Transcript at 561, lines 7-25; 562, lines 1-21.

Reimbursement of Capital Costs for Out-of-State Hospitals

152. Under the Pennsylvania medicaid prospective payment system Pennsylvania does not reimburse WVUH or other out-of-state hospitals for their capital costs in the same manner as Pennsylvania reimburses in-state hospitals. Facts 125.

153. The Pennsylvania medicaid prospective payment system has never reimbursed out-of-state hospitals using their actual allowable costs of capital. Facts 139.

154. The Pennsylvania medicaid prospective payment system pays out-of-state hospitals an "add-on" for capital reimbursement

that represents the average capital costs of all Pennsylvania hospitals. Facts 140.

155. The Pennsylvania "add-on" for capital costs to the reimbursement of out-of-state hospitals bears no relationship to the actual capital costs of those hospitals. Testimony of Thomas Manak, Transcript at 230, lines 7-15.

156. MAP gave in-state hospitals approximately 10 years to adjust to a flat rate payment for capital. Testimony of James Vertrees, May 6, 1988 Transcript at 78, lines 7-25; 79, line 1.

157. Out-of-state hospitals did not have a chance to adjust to a prospective payment for capital. Testimony of James Vertrees, May 6, 1988 Transcript at 79, lines 2-4.

158. Under the current Pennsylvania regulations that govern the medicaid prospective payment system, an out-of-state hospital that believes that the capital part of its payment is inadequate, cannot obtain more than that flat rate payment even if it can demonstrate that it has additional actual capital costs and that additional capital reimbursement is necessary to meet the costs of an efficiently and economically run institution. Deposition of David Feinberg at 164, lines 18-25.

159. Capital reimbursement is an important part of medicaid reimbursement because hospitals need to replace or expand their capital assets over time. Testimony of Gerard Anderson, Transcript at 364, lines 18-25; 365, lines 1-9.

160. WVUH's hospital facility has exhausted its useful life. Testimony of James vertrees, Transcript at 552, 18-22.

161. When WVUH opens its new facility, WVUH will have no opportunity to obtain relief from MAP, under existing regulations, to cover what it believes is the MAP share of the additional capital costs associated with the new construction.

Testimony of David Feinberg, May 4, 5, and 6, 1988 Transcript at 129, lines 6-25; 130, lines 1-7.

Reimbursement of Direct Medical Education Costs of Out-of-State Hospitals

162. Pennsylvania does not reimburse WVUH or any other out-of-state hospital for costs of DME attributable to Pennsylvania medicaid recipients. Facts 146.

163. WVUH incurs DME costs because it is a teaching institution. Facts 147.

164. If the indirect costs of teaching hospitals were simply averaged with the costs of non-teaching hospitals, the former would not be adequately reimbursed for the extra costs empirically shown to be associated with their teaching function, as reflected in the issue paper dated October 12, 1984. Facts 151.

165. Based on Medicare results, the defendants acknowledge that a hospital with an intern and resident-per-bed ratio of 0.3 would be expected to have costs about 18% higher than otherwise similar hospitals with an intern and resident-per-bed ratio of 0.0, as reflected in the issue paper dated October 12, 1984. Facts 154.

166. Because it costs more for a teaching hospital to provide care, teaching hospitals would be adversely affected by receiving a uniform DRG payment. Testimony of Gerard Anderson, Transcript at 326, line 25; 327, lines 1-15.

167. As a general proposition, DME costs are legitimate and accepted costs of maintaining a medical school or a teaching hospital. Facts 156.

168. Failure of all payers to pay their share of DME costs would either jeopardize a teaching hospital's teaching program or require that the costs be borne by another source. Facts 157.

169. The MAP papers governing "Teaching Hospitals" and "Direct Medical Education" (Plaintiff's Exhibits 6 and 8), do not contain any rationale or basis-in-fact for the MAP decision not to reimburse the DME costs of out-of-state hospitals. Testimony of Gerard Anderson, Transcript at 331, lines 15-19.

170. Although MAP could have asked for and verified the DME costs for large out-of-state providers, it chose not to. Testimony of James Vertrees, May 4, 5, and 6, 1988 Transcript at 550, lines 12-15. Testimony of Robert Gallagher, Transcript at 605, lines 1-7.

171. MAP stated that it would not pay for educating physicians out-of-state. Testimony of David Feinberg, May 4, 5, and 6, 1988 Transcript at 57, lines 19-24.

172. MAP had no actual data as to the number of physicians who train at WVUH but practice in Pennsylvania. Testimony of David Feinberg, My 4, 5, and 6, 1988 Transcript at 57, line 25; 58, lines 1-4.

V. WVUH Is The Largest Out-of-State Provider of Hospital Services to MAP Medicaid Recipients

173. The Hospital treated more Pennsylvania medicaid recipients than more than one half of the in-state hospitals for the period of July 1, 1985 through June 30, 1986. Facts 160.

174. WVUH provided more care to Pennsylvania medicaid residents than over one half of the in-state hospitals for fiscal year ending June 10, 1985 and fiscal year ending June 30, 1987. Plaintiff's Exhibit 51(A); Testimony of Thomas Manak, Transcript at 252, lines 3-7.

175. The Hospital treated more Pennsylvania medicaid recipients in fiscal year 1985-1986 than any other out-of-state hospital provider. Facts 161.

176. WVUH treated substantially more Pennsylvania medicaid recipients in fiscal year 1984-1985 and fiscal year 1986-1987 than any other out-of-state provider. Plaintiff's Exhibit 55.

177. In fiscal year 1985-1986, 163 out-of-state hospitals provided care to Pennsylvania medicaid recipients. Facts 162.

178. In both fiscal years 1984-1985 and 1985-1986, WVUH treated in excess of 800 Pennsylvania medicaid patient cases. In fiscal year 1986-1987, it treated approximately 730 Pennsylvania medicaid patient cases. The next largest out-of-state provider treated fewer than 160 Pennsylvania medicaid patients. Plaintiff's Exhibit 56.

179. For fiscal years 1984-1985, 1985-1986 and 1986-1987, most out-of-state hospital providers treated fewer than ten Pennsylvania medicaid cases. Plaintiff's Exhibit 56(A). Facts 170.

VI. The Effect of MAP Payment to WVUH

180. Because WVUH treats so many MAP cases, inadequate MAP reimbursement will have substantial financial consequences for the Hospital and will jeopardize its continued ability to care for MAP patients. Testimony of Bernard Westfall, Transcript at 98, lines 2-22. December 28, 1987 Deposition of James Vertrees at 56, lines 4-8; 60, lines 5-22; 61, lines 1-15.

181. If WVUH withdraws from the Pennsylvania medicaid program, it will jeopardize some Pennsylvania medicaid recipients' access to needed health care services. Testimony of

Bernard Westfall, Transcript at 96, lines 14-25; 97, lines 1-18; 98, lines 2-19.

182. The defendants' failure to reimburse the Hospital adequately will also curtail Pennsylvania medicaid recipients' freedom of choice if WVUH is compelled to withdraw from the Pennsylvania medicaid program.

183. On average, MAP reimburses in-state hospitals approximately 95% of the costs they incur in treating Pennsylvania medicaid recipients. In contrast, MAP reimburses WVUH for only approximately 54% of the costs it incurs in treating MAP patients. Testimony of Thomas Manak, Transcript at 663, lines 20-25; 664, lines 1-24.

184. MAP pays an in-state hospital $344.00 more to treat an average case than it pays WVUH to treat an average case. Testimony of Thomas Manak, Transcript at 244, lines 15-19.

185. MAP reimburses WVUH an increasingly lower proportion of WVUH's costs of caring for a Pennsylvania medicaid recipient. Testimony of Thomas Manak, Transcript at 246, lines 14-41. Plaintiffs' [sic] Exhibit 64.

VII. The MAP Appeals System

186. Pursuant to requirements of federal regulation 42 C.F.R. section 446.253(c), the Pennsylvania medicaid agency must provide hospitals with a system by which to appeal. Facts 175.

187. The administrative agency division which adjudicates the appeals is the Department of Public Welfare's Office of Hearings and Appeals (OHA). Testimony of David Feinberg, May 4, 5, and 6, 1988 Transcript at 87, lines 8-10.

188. OHA employs hearing officers, some of them attorneys, to hear appeals, take testimony, admit exhibits, make findings of fact, and determine whether the Pennsylvania Medicaid Agency properly applied its regulations. Defendants' Exhibits 31, 32.

189. The hearing officer recommends a decision to the Director of OHA, who either adopts or rejects the recommendation. Defendants' Exhibit 7. (General Rules of Administrative Practice); 1 Pa. Code, Part II; 55 Pa. Code 1101.

190. Both parties to the administrative appeal, the Office of Medical Assistance and the provider, have the right to request reconsideration from the Secretary should the other party prevail. Id.; 1 Pa. Code 33.61, 35.187(8) and 35.190.

191. Outside of the administrative appeals process, review of the decision of the Director of OHA or the Secretary of DPW may be sought from the judiciary of the Commonwealth of Pennsylvania.

192. The Commonwealth Court is the judicial body in Pennsylvania that is statutorily charged with the duty to review administrative decisions.

193. The administrative hearing officer in the Pennsylvania appeals system would provide no relief to an out-of-state hospital if the out-of-state hospital appealed on the grounds that it should be grouped as if it were an in-state hospital. Facts 177.

194. The administrative hearing officer in the Pennsylvania appeals system would provide no relief to an out-of-state hospital that appeals on the grounds that it should be reimbursed for the Pennsylvania medicaid share of its direct medical education costs. Facts 178.

195. The administrative hearing officer in the Pennsylvania appeals system would provide no relief for an out-of-state hospital

that appeals on the grounds that it should be reimbursed as an in-state hospital for its specific capital costs. Facts 179.

196. The administrative hearing officer in the Pennsylvania appeals system would provide no relief for an out-of-state hospital seeking inclusion of its hospital specific costs during the phase-in of Pennsylvania's prospective payment system as was the case for in-state hospitals. Facts 180.

197. If an out-of-state hospital were to appeal the adequacy of its rate and if the defendants had correctly applied the reimbursement methodology, i.e., the hospital were properly grouped with all other out-of-state hospitals, the hospital received the correct payment for the out-of-state group, and there were no error in the calculations, that out-of-state hospital would not prevail in an administrative appeal before an administrative hearing officer in the Pennsylvania appeals system. Facts 181.

198. No provision of law, including regulations, provides any authority or criteria that governs the Secretary of Public Welfare's grant or denial of relief to a hospital upon the Secretary's reconsideration of an adverse administrative appeals decision. Defendants' Exhibit 2, 3, 4, 5, 15.

VIII. MAP's Findings and Assurances to the Health Care Financing Administration

199. None of the findings and assurances MAP submitted to the Secretary of Health and Human Services (HHS) concerning the Pennsylvania prospective payment system for inpatient care directly references or is applicable to out-of-state hospitals. Defendants' Exhibit 15.

200. Defendants made no assurances to HHS specifically related to the adequacy of MAP reimbursement to out-of-state

hospitals. Testimony of Peter Goodman, Transcript at 525, lines 20-25.

201. The Health Care Financing Administration did not "look behind" MAP's assurances concerning the adequacy of its reimbursement rates, including its payment rates to out-of-state hospitals, nor did it require Pennsylvania to set forth the Commonwealth's specific findings concerning the adequacy of those rates. Testimony of Peter Goodman, Transcript at 531, line 25; 532, lines 1-7.

Discussion

Jurisdiction

Defendants challenge plaintiff's standing to bring this action. In Warth v. Seldin, 422 U.S. 490 (1975), the Supreme Court stated:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal court jurisdiction and prudential considerations on its exercise.... In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III.... A federal court's jurisdiction ... can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action....' [The prudential considerations involve] limits on the class of persons who may invoke the court's decisional and remedial powers.

Id. at 498-99 (citations omitted). In order for a plaintiff to satisfy prudential considerations, he or she generally must be asserting his or her own legal rights and interests, not the rights or interests of third parties. Id. at 499. Furthermore, a plaintiff's injury must be somewhat individualized. "[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." Id.

With regard to the constitutional requirements for standing, defendants' only "argument" is as follows: "[N]othing requires plaintiff to participate in the program. It has no real injury and Article III's requirements have not been met." Defendants' Post-Trial Memorandum at 62. To its credit, WVUH does not respond to this argument. With regard to the prudential considerations, defendants argue that plaintiff, as a provider of medical services, does not have interests within the zones protected by the sections of Title XIX on coverage and protection afforded recipients, neither are plaintiff's interests within the zone protected by the section of Title XIX on payment for hospital services.

The "zone-of-interests" test refers to "the question whether the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

The primary beneficiaries of Title XIX are recipients of health care services. However, providers "can properly seek to enforce the reimbursement standards of the Medicaid statute both in the own right and as representatives of Medicaid recipients." Wilmac Corp. v. Heckler, 633 Supp. 1000, 1006 (E.D. Pa. 1986), vacated on other grounds, 811 F.2d 809 (3d Cir. 1987). Because WVUH seeks to enforce the federal standards on reimbursement, it has standing to assert claims under Title XIX. See, e.g., Washington State Health Facilities Ass'n v. State of Washington Dept. of

Social and Health Services, 698 F.2d 964 (9th Cir. 1982) (providers successfully sought injunction to prevent state from enforcing a regulation which deviated from the federally approved state medicaid plan by altering the method of reimbursing nursing care facilities without receiving federal approval); Edgewater Nursing Center, Inc. v. Miller, 678 F.2d 716 (7th Cir. 1982) (nursing home owners unsuccessfully challenged the validity of the cutoff date for determining the year of construction or latest acquisition in Illinois' method of reimbursing capital costs); Troutman v. Cohen, 588 Supp. 590 (E.D. Pa. 1984), aff'd without opinion, 755 F.2d 924 (3d Cir. 1984) (providers unsuccessfully sought injunction against implementation of Pennsylvania's reimbursement regulations).

Defendants also contend the Hospital does not have a cause of action under 42 U.S.C. section 1983 to assert defendants' violations of the Social Security Act. As plaintiff points out, defendants do not challenge the court's jurisdiction to hear a challenge to the state's compliance with federal law; the court has jurisdiction to hear such challenges pursuant to 28 U.S.C. section 1331. Rather, defendants raise a question as to whether the remedy of a section 1983 cause of action is available. 42 U.S.C. section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In 1980, the Supreme Court, rejecting an argument that the phrase "and laws" should be read as limited to civil rights or equal protection laws, stated unequivocally:

> [T]he plain language of the statute [42 U.S.C. 1983] undoubtedly embraces respondents' claim that petitioner violated the Social Security Act.
>
> Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. Rosado v. Wyman, 397 U.S. 397 (1970), for example, 'held that suits in federal court under 1983 are proper to secure compliance with provisions of the Social Security Act on the part of participating States.' Edelman v. Jordan, 415 U.S. 651, 675 (1974).

Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

The Thiboutot Court also discussed the propriety of invoking pendent jurisdiction to decide the Title XIX challenges where constitutional challenges were raised as well. In those cases (cited at 6 in the Thiboutot opinion) "[section] 1983 was necessarily the exclusive statutory cause of action...." Id. at 6. In the case at bar, this court exercises federal question jurisdiction on plaintiff's Fourteenth Amendment challenge of equal protection and can invoke pendent jurisdiction if it so chooses. However, this court is satisfied a Social Security Act cause of action lies under section 1983 whether or not a constitutional challenge exists. The court finds it has jurisdiction to adjudicate this action.

Compliance With Federal Law

The central question in this action is whether defendants satisfy the federal law requirements set forth in 42 U.S.C. section 1396a(a)(13)(A) in reimbursing WVUH for inpatient hospital services provided to Pennsylvania medicaid recipients. Although the court's standard of review of nonadjudicatory agency action is confined to a determination of whether the action is arbitrary or capricious, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Colorado Health Care Ass'n v. Colorado Dept. of Social Services, 842 F.2d 1158 (10th Cir. 1988), "[a] district court can, of course, decide whether federal law has been violated." Mississippi Hosp. Ass'n. v. Heckler, 701 F.2d 511, 516 (5th Cir. 1983). "So long as the specific requirements of the law are met, the Court must defer to the agency's exercise of discretion unless it acts arbitrarily or capriciously." Mary Washington Hosp., Inc. v. Fisher, 635 F. Supp. 891, 896 (E.D. Va. 1985).

The federal law at issue here, 42 U.S.C. section 1396a(a)(13)(A), known as the Boren Amendment, is part of the Omnibus Budget Reconciliation Act of 1980 (OBRA). Congress' purpose in passing the Boren Amendment were twofold: "first, that the states set their own reimbursement rates without stifling and expensive federal oversight of the methodology used; and, second that Medicaid expenses be reduced by allowing the states to develop payment systems which would encourage efficiency." Colorado Health Care Ass'n, 842 F.2d at 1165. The Boren Amendment provides in pertinent part:

> A State plan for medical assistance must - . . . provide - . . . for payment . . . of the hospital, skilled nursing facility, and intermediate care facility services provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State) and which, in the case of hospitals, take into account the situation of

> hospitals which serve a disproportionate number of low income patients with special needs and provide, in the case of hospital patients receiving services at an inappropriate level of care . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access (taking into account geographic location and reasonable travel time) to inpatient hospital services of adequate quality; and such State makes further assurances, satisfactory to the Secretary, for the filing of uniform cost reports by each hospital, skilled nursing facility, and intermediate care facility and periodic audits by the State of such reports; . . . .

42 U.S.C. 1396a(a)(13)(A).

The Health Care Financing Administration (HCFA) charged with the responsibility for administering the Medicare and Medicaid programs, published regulations implementing the Boren Amendment on September 30, 1981. 42 C.F.R. 447.250-447.280. In pertinent part, the regulations require states which participate in the Medicaid program to make findings and submit assurances to HCFA (id. at 447.253(a)(b)) that their inpatient hospital service payment rates "are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities . . . ." Id. at 447.250(a). Furthermore, states must, in setting their reimbursement rates, "take into account the situation of hospitals which serve a disproportionate number of low income patients . . . ." Id. at 447.253(b) (1)(ii)(A).

It is plaintiff's contention the defendants have not complied with the Boren Amendment or its implementing regulations. WVUH is challenging the legality of Pennsylvania's overall payment system, based upon statutory requirements and upon Pennsylvania's own definition of what should be included in a reasonable rate. One part of the challenge involves the issue of the number and type of low income patients WVUH serves. Approximately thirty-eight percent (38%) of all WVUH admissions are low income persons. This figure includes charity patients, bad debts, and medicaid recipients. Approximately twenty-three percent (23%) of the 38% are medicaid recipients. Out of that 23%, seventeen percent (17%) are West Virginia medicaid recipients and five percent (5%) are Pennsylvania medicaid recipients. The court finds WVUH serves a disproportionate number of low income patients. The statute and implementing regulations are plain and clear in their requirement that states, when setting rates, take into consideration whether a hospital serves a "disproportionate number of low income patients with special needs." Id. Thus, the law provides any reimbursement rate for WVUH must reflect that fact.

When Pennsylvania set its DRG reimbursement rates for out-of-state hospitals, it did not consider whether a hospital served a disproportionate number of low income persons. It merely determined the average DRG reimbursement rate for in-state hospitals and applied that figure across the board to out-of-state hospitals. As an out-of-state hospital, WVUH's low income patient-factor was not considered by DPW when it set the Hospital's rate. WVUH contends Pennsylvania violated federal law because it did not consider the Hospital's low-income-patient-factor.

The defendants argue they are in compliance with federal law because according to their calculations WVUH does not serve a disproportionately high number of low income patients and therefore that factor did not have to be considered in setting the Hospital's rate. The reason the defendants do not consider

WVUH as a hospital with a high low-income-patient factor is because DPW considered only Pennsylvania medicaid recipients in its definition of low income patients. Pennsylvania uses Pennsylvania medicaid volume as a proxy for low income population. While consideration of only Pennsylvania medicaid recipients may be valid for in-state hospital rate setting, (that question is not before the court), it is not valid for out-of-state hospital rate setting. Congress recognized a hospital's costs would be proportionately elevated commensurate with its low income patient population. Members of the Congressional conference on the Boren Amendment "recognize[d] that public hospitals and teaching hospitals which serve a large Medicaid and low income population are particularly dependent on Medicaid reimbursement, and . . . [they were] concerned that a State take into account the special situation that exists in these institutions in developing their rates." H.R. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 2, reprinted in 1981 U.S. Code Cong. & Admin. News 1010, 1324. Apparently Congress did not intend to distinguish between in-state or out-of-state medicaid patients. Furthermore, low income patients other than medicaid recipients were intended to be included in a state's consideration as well.

A medicaid patient from West Virginia drives up the cost of services the same as a medicaid patient from Pennsylvania. If Pennsylvania's formula for complying with federal law were accepted, it is quite possible a hospital with highly disproportionate numbers of low income patients could be reimbursed at outrageously low rates. A hypothetical situation drafted by plaintiff vividly illustrates the deficiency of Pennsylvania's formula:

[A]ssume the following:

1. A hospital is located where three states converge;

2. The hospital takes 1/3 of its patients from each state;

3. A medicaid volume of 24% is presumed by each state to be indicative of a disproportionate share provider;

4. The hospital has a medicaid volume of 30%, and those medicaid patients come equally from each of the three states (i.e., 1/3 x 30% = 10%).

Under these facts, the hospital is a disproportionate share provider, but if each state were to group the hospital, counting only its 10% share of medicaid patients, the hospital would never receive the more favorable reimbursement treatment Congress intended.

Plaintiff's Post-Trail Reply Memorandum at 28-29.

In order for Pennsylvania to comply with federal law on adequately and reasonably compensating hospitals which serve a disproportionate number of low income patients, it must consider more than Pennsylvania medicaid recipients only. Therefore, the fact that only 5% of WVUH's low income population are Pennsylvania medicaid recipients does not disqualify WVUH from consideration as a disproportionate share provider under federal law. The court finds because defendants did not take the WVUH'S situation vis a vis low income patients into consideration in setting the Hospital's rates, they have violated 42 U.S.C. section 1396a(a)(13)(A) and its implementing regulations 42 C.F.R. sections 447.250447.280.

Defendants also argue they are in compliance with federal law despite not having considered out-of-state hospitals' situations vis a vis low income patients because the federal government approved its plan. DPW submitted assurances to HCFA that its methodology and program met the requirements of the Boren Amendment. The assurances did not included anything regarding

out-of-state hospitals specifically. The assurances were based on information requested from and submitted by in-state hospitals. For instance, one part of the assurances states: "The Department also used all hospitals' most recently filed cost reports for the Medical Assistance Program and the hospitals' last audited per diem rates." Defendants' Exhibit 13. In fact, no cost reports or audited per diem rates were requested from or received from out-of-state hospitals. The assurances read as if all hospitals' individual situations and characteristics were considered by DPW. However, the assurances were based on findings regarding in-state hospitals only. In approving DPW's program, which included the plan for reimbursing out-of-state hospitals, HCFA did not "look behind" the submitted assurances. In other words, the federal government took at face value DPW's assurances that it made findings that its payment rates "are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities ... [and that DPW took] into account the situation of hospitals which serve a disproportionate number of low income patients...." 42 C.F.R. 447.150, 447.253(b)(l)(ii)(A).

Defendants argue HCFA's approval of DPW's program demonstrates its validity. However, HCFA admits it did not examine DPW's assurances for accuracy or truthfulness or for anything. It merely accepted DPW's statements at face value. This in and of itself would not necessarily undermine DPW's assertion that government approval demonstrates validity, but the fact that the assurances are based only on in-state hospitals does lessen considerably any "weight that HCFA's resultant approval of the plan might otherwise have carried with the Court." Mary Washington Hosp., 435 F.Supp. at 898; see Aitchison v. Berger, 404 F.Supp. 1137, 1148 (S.D.N.Y 1975), aff'd without opinion, 538 F.2d 307 (2d Cir. 1976), cert. denied, 429 U.S. 890 (1976). In fact, the assurances are not based on findings that the plan comports with the statute's requirement of reasonable and adequate compensation and on findings that the plan comports with the statute's requirement that a hospital's low

income-patient-factor be taken into consideration. The court finds because DPW did not comply with the Boren Amendment's implementing regulations, government approval of its plan does not demonstrate the plan's validity.

Another aspect of Pennsylvania's program with which plaintiff takes issue is the system for reimbursement of capital costs. From July 1, 1984 to June 30, 1986, Pennsylvania reimbursed in-state hospitals for the medicaid share of their allowable capital costs. On July 1, 1986, Pennsylvania began a seven year phase-in of a prospective payment system for capital cost reimbursements for in-state hospitals. For out-of-state hospitals, Pennsylvania has reimbursed a fixed amount to cover costs regardless of the actual costs incurred. Pennsylvania has not provided a phase-in period for out-of-state hospitals.

Pennsylvania uses fiscal year 1985 as its base year for the capital reimbursement system. As of the time of trial, WVUH was expected to open its new replacement hospital during 1988. As a result of the opening of the new facility, WVUH will experience a marked increase in its capital costs. Pennsylvania's regulations do not provide an exception to hospitals which replace their facilities, whether they are in or out-of-state hospitals. The base year will be applied to WVUH despite WVUH's recognized need to replace its facility.

In addition to its objections to Pennsylvania's system for capital cost reimbursement and operating cost reimbursement, plaintiff objects to Pennsylvania's decision not to reimburse out-of-state hospitals for their direct medical education (DME) costs. Pennsylvania does not reimburse out-of-state hospitals for any of their DME costs. Largely it is interns' and residents' salaries which account for the bulk of a hospital's DME costs. Residents spend approximately seventy-five percent (75%) of their time administering patient care. Therefore, a reimbursement of DME costs is, in effect, largely a reimbursement for patient care.

Teaching hospitals are virtually always more expensive per DRG than non-teaching hospitals. Pennsylvania recognizes an adjustment in reimbursement is necessary to compensate teaching hospitals for their higher indirect patient care costs. Pennsylvania acknowledges if a teaching hospital did not receive compensation for its DME costs, it could cause serious financial difficulties for the institution. If one payer does not bear its share of DME costs, either other payers will be unfairly burdened with picking up the difference or the existence of the teaching programs could be jeopardized. Concomitant with the increased indirect costs of patient care at a teaching hospital, is the increased quality of care the patients receive. Pennsylvania medicaid recipients get the benefit of this higher quality care but WVUH is not compensated by Pennsylvania for giving it. WVUH asserts Pennsylvania is violating its own definition of adequate and reasonable reimbursement under the OBRA standard. Because Pennsylvania recognizes that its payment of DME costs to its in-state hospitals satisfies the OBRA standards, WVUH argues, that by not making those payments to similarly situated out-of-state hospitals, Pennsylvania is not satisfying the OBRA standards.

The reason defendants offer for not reimbursing out-of-state hospitals is they do not wish to finance the training of non-Pennsylvania physicians. However, not all WVUH residents practice in West Virginia. Approximately seven percent (7%) of them practice in Pennsylvania. Also, not all residents trained in Pennsylvania will practice there. Thus, Pennsylvania does help finance the training of non-Pennsylvania physicians. In addition to Pennsylvania medicaid recipients receiving the benefits of a higher quality of care, and in addition to Pennsylvania benefitting from having some of its physicians trained at WVUH, Pennsylvania doctors also benefit from WVUH's teaching status by using the Hospital's resources and expertise through the Medical Access Referral System.

Reasonableness and Adequacy

Although plaintiff attacks the validity of each of the components of defendants' out-of-state reimbursement system, it is the validity of the system as a whole and the resultant total rate of reimbursement which is important. E.g., Colorado Health Care Ass'n v. Colorado Dept. of Social Services, 842 F.2d 1158, 1167 (10th Cir. 1988). For instance, it is not controlling whether Pennsylvania provides a phase-in period on capital costs reimbursement or whether it engaged in a grouping analysis for out-of-state hospitals. In the Colorado Health Care Ass'n case, the court considered a challenge to the Colorado Department of Social Services' decision to suspend an incentive payment available in the state's reimbursement system. The challengers argued dropping the incentive payment violated the Boren Amendment. The court disagreed.

> It is the resulting overall payment which is evaluated for statutory compliance. See Wisconsin v. Reivitz, 733 F.2d 1226, 1233 (7th Cir. 1984) (price medicaid reimbursement rate is not, per se, the only reasonable and adequate rate); accord Illinois Council on Long Term Care v. Miller, 579 F.Supp. 1140, 1147 (N.D.E.D.Ill. 1983). Reasonableness has been characterized as a zone, not a pinpoint.

Id.

The zone of reasonableness has been construed "as a zone or range in which a State may consider the relevant factors and data and determine a valid reimbursement which is reasonable and adequate. The state must articulate a 'rational connection between the facts found and the choice made.'" Colorado Health Care Ass'n, 842 F.2d at 1167 (quoting Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 105 (1983)).

To determine its methodology and rate reimbursement to in-state hospitals, Pennsylvania requested and received a very large amount of information from those hospitals. Pennsylvania confirmed the information, broke it down, studied it, massaged it, and used it to create a detailed, sophisticated methodology of reimbursement. The purpose behind the methodology was to create a system which would be responsive to the situational realities of the in-state hospitals, while keeping within conservative budgetary limits. Achieving this purpose would satisfy the goals of the Boren Amendment "that medicaid expenses be reduced by allowing the states to develop payment systems which would encourage efficiency." Colorado Health Care Ass'n, 842 F.2d at 1165. Furthermore, achieving this purpose would also satisfy the statutory and regulatory requirements of the Boren Amendment by reimbursing hospitals reasonably and adequately for their costs in treating medicaid patients.

Pennsylvania's approach to developing a methodology for out-of-state hospitals contrasts sharply with its approach to developing one for in-state hospitals. It admits it did not in any way whatsoever attempt to design a methodology which would be even remotely related to the situational realities of out-of-state hospitals. For operating costs reimbursements, Pennsylvania took the average payment to in-state hospitals and blindly applied it to each out-of-state hospital. For capital costs reimbursements, Pennsylvania determined a base year and a flat rate and blindly applied it to each out-of-state hospital. For direct medical education costs reimbursement, Pennsylvania cut-out payment altogether.

In addition, as has been discussed at length, supra, defendants have not complied with the statute's directive to consider the low income patient status of the Hospital, nor has Pennsylvania complied with the implementing regulations' requirement that the assurances made to HCFA be based on findings that a payment is adequate and reasonable. The

defendants did not base their decisions on anything pertinent regarding the out-of-state hospitals themselves.

Defendants allege administrative resource and self-imposed time constraints dictated their handling of out-of-state hospitals. The court is not insensitive to the state's budgetary limitations. Here, budgetary limitations meant only a certain number of people were available to work on developing the prospective payment system. These budgetary and resultant personnel constraints can be considered by the state as a factor in developing the system, "so long as the result complies with the federal requirements for a reasonable and adequate payment." Colorado Health Care Ass'n, 842 F.2d at 1168. In short, budgetary constraints will not excuse a state's failure to comply with federal law. Wisconsin Hospital Ass'n v. Reivitz, 733 F.2d 1226, 1236 (7th Cir. 1984); Friedman v. Perales, 668 F.Supp. 216, 221 (S.D.N.Y. 1987), aff'd, 841 F.2d 47 (2d Cir. 1988). The defendants admit they did not treat the issue of out-of-state hospital methodology and reimbursement as a substantive issue. It was for them merely a technical issue.

It is certain defendants did not base their decisions on out-of-state hospitals on any relevant data. They did not attempt to test their decision against the requirements of the federal law. In essence, they assumed, without any basis-in-fact, their decision was valid under the federal law. The court finds, "[s]uch intuitional forms of decision making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary." Central Florida Enterprises, Inc. v. Federal Communications Comm'n, 598 F.2d 37, 50 (D.C.Cir. 1978), cert. denied, 460 U.S. 1048 (1983). The state has failed to articulate a rational connection, or any connection, between the situational realities of out-of-state hospitals and the decision to reimburse them as it chose. Therefore, the court finds the decision made by Pennsylvania on how to reimburse out-of-state hospitals and at what rate was arbitrary and capricious. In its totality, Pennsylvania's prospective payment system for out-of-state

hospitals violates federal law. The payments to WVUH are not reasonable and adequate: the payments do not reflect WVUH's high low income patient population; the payments do not compensate WVUH for Pennsylvania medicaid's share of the Hospital's DME costs; the payments will not fairly cover Pennsylvania's medicaid share of WVUH's capital costs; and the DRG payment rate is insufficient to meet the operating costs incurred by this "efficiently and economically operated" facility[2].

WVUH is being harmed by receiving less than adequate payment from Pennsylvania. Had the Hospital been treated as a similarly situated hospital in Pennsylvania, and had the defendants complied with federal law regarding consideration of a hospital's low income patient population, WVUH would have received approximately $2.3 million more from Pennsylvania than it has received under the prospective payment system. On average, an in-state hospital is reimbursed for approximately 95% of its costs in treating a Pennsylvania medicaid recipient. WVUH is reimbursed for approximately 54% of its costs in treating a Pennsylvania medicaid recipient. Either in-state hospitals are receiving a huge windfall, or WVUH is receiving far less than it is entitled to under the federal law.

As noted in the findings of facts, the prospective payment system which is a DRG payment-based system creates cases which are "winners" and "losers." A "winner" is a case for which a hospital is paid more than what its charges are in that case. A "loser" is a case for which a hospital is paid less than what its charges are in that case. The prospective payment system was designed to balance the incidents of winners and losers to ensure no hospital is over or under compensated in the long-run. That is how it works for in-state hospitals. It does not work that way for

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2 It should be noted defendants have not alleged WVUH is not an "efficiently and economically operated" facility.

out-of-state hospitals. Out-of-state hospitals never get winners. This is because they are paid either the DRG payment or their actual charges -- whichever is less. Without a balance of winners and losers, a hospital will surely be underpaid in the long-run.

WVUH is being harmed by its treatment under Pennsylvania's payment system. The inadequacy of reimbursement raises serious questions about WVUH's ability to provide care to Pennsylvania medicaid recipients. The Hospital cannot continue indefinitely to sustain the losses imposed on it under the current reimbursement system. The defendants' own expert testified that although a prospective payment system which relied exclusively on a statewide average may be a desirable ultimate goal, imposing such a system suddenly, would be "dangerous." He testified "[i]t would bankrupt them [the hospitals] potentially .... [T]he teaching hospitals in particular have extremely high costs." Vertrees Deposition at 40, lines 13-15. WVUH cannot continue indefinitely to provide the level of services and care it not provides to Pennsylvania medicaid recipients if it continues to receive inadequate and unreasonable reimbursement from Pennsylvania. Testimony of Bernard Westfall, Transcript at 96-98.

WVUH is by far Pennsylvania's most important out-of-state provider. Although it may only account for one percent (1%) of Pennsylvania's provider budget, it treats more Pennsylvania medicaid recipients than half the hospitals in Pennsylvania. Forcing the Hospital to limit or compromise the quality of care or services it provides to Pennsylvania medicaid recipients is in contravention of the Boren Amendment. The "ultimate touchstone" of the Boren Amendment is whether

> a reimbursement policy will alter the availability of or quality of care to be provided.... 46 Fed. Reg. 47970; see Mary Washington Hospital, Inc. v. Fisher, ... 635 F.Supp. at 901-904 (Congress added reasonable access constraint to prevent states from lowering reimbursement rates so much that a dangerous number of hospitals might withdraw from the program).

Friedman v. Perales, 668 F.Supp. at 225. The reimbursement system, if not altered, will ultimately have a measurable negative impact on Pennsylvania medicaid recipients because their ready access to quality care will be impaired. This is another reason why the overall system for out-of-state hospitals is violative of the federal law.

Fourteenth Amendment

Another question before the court is whether Pennsylvania's disparate treatment constitutes unconstitutional discrimination in violation of WVUH's equal protection rights under the Fourteenth Amendment. The state has developed a payment methodology in which it classifies hospitals and bases reimbursements on hospitals' classifications. The method used by the state has resulted in plaintiff being placed in a class in which it receives a considerably lower reimbursement than other hospitals similarly situated but within Pennsylvania's borders.

The court applies a "traditional" equal protection analysis because suspect classifications such as race, religion or national origin are not involved here. "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." Frontiero v. Richardson, 411 U.S. 677, 683 (1973)(citing Jefferson v. Hackney, 406 U.S. 535, 546 (1972)); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Flemming v. Nestor, 363 U.S. 603, 611 (1960); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Dandridge v. Williams, 397 U.S. 471, 485 (1970). Whether defendants' classifications are unconstitutional turns on the question of reasonableness.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.'

Dandridge v. Williams, 397 U.S. at 485 (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 68 (1911)).

In cases involving economics and social welfare wherein classifications and resultant "imbalanced" treatment occur, the United States Supreme Court looks for links between legitimate governmental interests and the classifications. E.g. Dandridge v. Williams, supra (State regulation placing a maximum ceiling on benefits in the Aid to Families with Dependant Children (AFDC) program was challenged unsuccessfully by large family recipients. Court found the regulation free from invidious discrimination and found it rationally related to the "State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of working poor." Id. at 486.); Jefferson v. Hackney, 406 U.S. 535 (1972) (State's decision to provide somewhat lower welfare benefits to AFDC recipients than to the aged and infirm was not invidious or irrational because it is not unreasonable for a state to conclude "that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living.... [I]t is not irrational for the State to believe that the young are more adaptable than the sick and elderly...." Id. at 549.); Richardson v. Belcher, 404 U.S. 78 (1971)(Recipient of federal disability benefits challenged classification wherein his benefits were reduced as a result of his receipt of state workmen's compensation benefits. The Court found Congress' goals of encouraging able workers to return to work and forestalling the erosion of workmen's compensation programs were legitimate,

and the challenged classification was rationally related to the achievement of those goals.)

In the case at bar, defendants have not clearly articulated just what their interest are. This makes the task of evaluating the legitimacy of the state's interests difficult. Further, defendants have not coherently argued the link between the classifications of in-state versus out-of-state and the achievement of state interest (whatever they may be). Rather, they defend their decision by pointing out perceived differences in the classes and the administrative difficulties they would experience if out-of-state hospitals were classified under the in-state hospital grouping system and paid under the in-state hospital methodology.

Defendants argue it is reasonable to classify out-of-state hospitals differently based on that characteristic of being an out-of-state hospital alone because: "they are eligible for payment only in limited circumstances (42 C.F.R. 431.52(b)), provide services infrequently, do not file cost reports, are administered by other states, are often not enrolled as providers until after services are rendered, and are not subject to the same documentation and auditing requirements as in-state providers." Defendants' Post-Trial Memorandum at 32. None of defendants' proffered reasons provides a rational basis for the state's discriminatory practice.

Defendants' assertion 42 C.F.R. section 431.52 provides a basis for treating out-of-state hospitals differently is not supported. The regulation is not directed towards the treatment of hospitals but towards the treatment of medicaid recipients. The regulation merely enumerates the instances and circumstances under which Pennsylvania residents may receive medicaid benefits when the residents are absent from the state. The argument on out-of-state hospitals providing services infrequently is based on an inaccurate analysis. While the statement may be true for some, or even many out-of-state hospitals, it is not at all true for WVUH. As noted previously,

plaintiff treats more Pennsylvania medicaid recipients than half of Pennsylvania's hospitals. As to out-of-state hospitals not filing cost reports, defendants do not request cost reports. There is nothing in the record to suggest plaintiff and other out-of-state hospitals would not file cost-reports if requested by defendants. Next, the fact that out-of-state hospitals are administered by other states does not explain why they should receive different reimbursement rates or be treated differently as to DME costs or capital costs. That out-of-state hospitals are often not enrolled as providers until after services are rendered does not explain why those hospitals which are enrolled receive disparate treatment. Finally, defendants' asserted rationale that disparate treatment is warranted because out-of-state hospitals are not subject to the same documentation and auditing requirements fails to provide a link because, again, there is nothing in the record to suggest out-of-state providers would not supply appropriate documentation, if asked to do so, and would not subject themselves to audits, if asked to do so. Indeed, Pennsylvania could audit 75-100 more hospitals each year without increasing its audit staff.

After listing their "justification" for the disparate treatment, the defendants offer what appear to be interests. They state:

> DPW reasonably determine [sic] that certain incentives for growth, quality of care, and availability, e.g., special payments for medical education costs, were not warranted for out-of-state facilities because the return on such incentive payments was not as significant as from such payments to in-state hospitals.[3]

3 The court has already discussed (see pages 45-46 of the memorandum) the irrationality of DPW's reasoning regarding payment of DME costs.

There is no evidence in the record to support a finding these "interests" were thought of, let alone articulated, during the decision making process. Even the court's use of the term "decision making process" rings untrue in light of the manner in which the decisions regarding out-of-state hospitals were made. DPW did not "reasonably determine" anything regarding out-of-state hospitals. Defendants did not attempt to acquire information on out-of-state hospitals. They did not inquire about which, if any, out-of-state hospitals were frequent providers. They did not inquire as to what impact their decision would have on the hospitals. In its post-trial reply brief at page 57, plaintiff provides a telling summary of how and why decisions on out-of state hospitals were arrived at. Citing and quoting from Mr. Debrunner's testimony, plaintiff explains:

> [O]ut-of-state hospitals reimbursement had no perceived political implications, Transcript at 498, lines 10-15; ... no empirical studies were done to determine how to reimburse out-of-state hospitals, Transcript at 498, lines 16-19; ... no one was complaining, Transcript at 498, lines 23-25; and ... 'why fix what ain't broke.' transcript at 449, lines 7-9.

The court finds defendants have not articulated a rational connection between their asserted interest and the classifications of in-state versus out-of-state hospitals. Defendants' decision to classify out-of-state hospitals in the manner they did was arbitrary, not related to legitimate state interest and the classification has resulted in invidious discrimination. Defendants have violated plaintiff's Fourteenth Amendment rights.

Administrative Appeals System

Federal law requires states participating in the medicaid program to have an appeals process whereby payment rates can be

reviewed. 42 U.S. C. 1396(a)(37); 42 C.F.R. 447.253(c). The federal regulation states:

> Provider appeals. The medicaid agency must provide an appeals or exception procedure that allows individual providers an opportunity to submit additional evidence and receive prompt administrative review, with respect to such issues as the agency determines appropriate, of payment rates.

42 C.F.R. 447.253(c). Plaintiff contends defendants' appeals system is legally inadequate because it is undisputed that were WVUH to appeal its payment rate, it absolutely could not obtain relief if the out-of-state methodology had been correctly applied. Pennsylvania defends the validity of its appeals process asserting DPW has the authority to hear and determine challenges to the validity and constitutionality of its regulations.

When Congress revised the medicaid statutes it recognized the importance of an adequate appeals process. Early on, HCVA expressed its concern regarding the appealability of individual facilities' rates.

> The revised regulations require each State agency to develop an appeals procedure that allows a provider to submit evidence to the agency and seek prompt administrative review of its payment rate. We believe the appeals requirement described above is needed because individual facility rates will not receive Federal review under the revised regulations.
>
> We believe that individual facilities must be given some opportunity to request review and adjustment of their rates.

46 Fed. Reg. 47968-47969 (September 30, 1981)(emphasis added). After receiving invited comments on appeals regulations, HCVA iterated its position on reviewable rates. Displaying confidence in the states' abilities to recognize the need for rate reviewability and to promulgate adequate appeals systems, HCVA declined to write-into the regulations provisions on retroactive or prospective adjustments. It stated: "We believe that fair and reasonable rate adjustments are implicit in an appeals process and see no need for a prescriptive Federal requirement." 48 Fed. Reg. 56052 (December 19, 1983). The plain language of the regulation and the pertinent legislative history make it clear legally sufficient appeals systems provide for individual facilities to meaningfully challenge their rates. To the court, this means a facility can have the propriety of its rate reviewed, not merely the accuracy of the application of the methodology employed to arrive at the rate.

The plaintiff in Mary Washington Hosp., Inc. v. Fisher, 635 F.Supp. 891 (E.D.Va. 1985) challenged Virginia's appeals process. The parallels of the Virginia system to the Pennsylvania system are so strong that extensive quoting from that case is appropriate here. Discussing the Virginia appeals provision, the court stated:

> This appeals provision states little more than the hospitals can appeal the application of the principles of reimbursement but they cannot appeal the principles of reimbursement themselves.... [T]his means that a hospital could appeal only on, e.g., whether it was properly categorized as ... rural instead of urban. Evidence that a particular hospital's costs were high for its peer group because of special, necessary, and expensive services which it alone offered could not justify any relief, even partial, from the general rate under ... [Virginia's] interpretation. Likewise evidence that a hospital's costs were higher than those of its peer group for reasons beyond its control would not get a hospital

> any additional reimbursement under Virginia's system, even if that hospital's participation in the Medicaid program was crucial to ensure certain Medicaid recipients "reasonable access" to hospital services.
>
> The Court is satisfied that Virginia's appeals provision, as interpreted, is unreasonably and arbitrarily narrow.

Id. at 904. This court agrees with the Mary Washington court in that

> the more general the rate-setting system is, the stronger the need for some appropriate method of accommodating particular situations that the general rules do not adequately address.... If, ... a state fixed a single reimbursement rate across the state, there would almost certainly be a need for a broader form of appeal or exception process that would allow individual hospitals relief from the general rule.

Id. at 903.

The observation regarding a single reimbursement rate and the concomitant need for a broad form of appeal is as accurate in a situation where the single rate is set for out-of-state hospitals as it is where the single rate is set for in-state hospitals. The impropriety of the single rate should be open to challenge by individual providers. In the instant case, defendants admit WVUH cannot appeal the fact of its rate. It can only appeal the application of the methodology. For all practical purposes, the only question entertained on appeal would be "was WVUH properly categorized as an out-of-state hospital rather than an in-state hospital." That question would be answered in the affirmative, thus effectively ending all inquiry into WVUH's rate. The court finds Pennsylvania's appeals system legally insufficient

because a provider with a facially bona fide rate challenge cannot obtain a meaningful review. If an appeals systems provides only that a rate adjustment challenge begin and end with an inquiry into whether the numbers were correctly crunched and whether the "i's" were dotted and "t's" crossed, that appeals system does not meet the federal standards.

The defendants argue the appeals system is legally sufficient because the agency is empowered to rule on the validity and constitutionality of its own regulations. See the authority cited at 34-35 of Defendant's Post-Trial Memorandum. The court agrees, as a general proposition, Pennsylvania state agencies are so empowered; however, as a practical matter such empowerment is ineffective in the instant matter. The state's position regarding the constitutionality of its prospective payment system and its administrative appeals process is quite clear: both fully comport with federal regulations and are constitutionally sound. This court will not force a provider to take its challenges to an agency when the agency's adjudication of the challenges is a foregone conclusion. See Delaware Valley Convalescent Center v. Beal, 488 Pa. 292, 412 A.2d 514 (1980)(where nothing in the record suggests a provider would not be afforded a meaningful administrative agency review, exhaustion is requested as a prerequisite to judicial review).

Defendants have admitted were WVUH to appeal its rate, the rate itself would not be adjusted. Only the application of the formula would be reviewed. This means WVUH "can appeal the application of the principals of reimbursement but [it] ... cannot appeal the principals of reimbursement themselves...." Mary Washington at 904. As discussed above, this is inadequate under the federal law.

Lastly, defendants point out the Secretary of Public Welfare has the authority to invalidate, waive or grant exceptions to any of the regulations. The statutory authority for this purported power is 1 Pennsylvania Code section 33.61, 35.18,

35.187(8), and 35.190. After carefully reading these code sections, the court finds they do not address the Secretary's authority to waive regulations or grant exceptions to them. They serve merely as a "how to" for aggrieved parties. 1 Pennsylvania Code section 33.61 concerns how to get a waiver of the formal requirements of the appeals process. It has nothing to do with obtaining a waiver of a substantive regulation. Next, section 35.18 delineates the appropriate content and form for petitions for waivers. Again, nothing in this section relates to the power of the Secretary to grant petitions. Section 35.187(8) speaks to the authority of presiding officers to certify questions to the agency head for disposition by the agency head. Finally, section 35.190 concerns the procedure whereby an aggrieved party can appeal the rulings of presiding officers: subsection (a) discusses the propriety of interlocutory appeals to the agency head during the pendency of hearings; subsection (b) discusses the requirements for "offers of proof" made in connection with an objection to a ruling on proffered oral testimony; and subsection (c) discusses the significance of the agency head's timetable for rendering decisions. Again, nothing in this section bears on the Secretary's purported authority to waive substantive regulations.

The case law cited in support of defendants' contention on the Secretary's authority is almost as unpersuasive as the statutory support. In Stanley v. Commonwealth, Department of Public Welfare, 535 A.2d 674 (Pa.Commw. 1987), the Secretary had discretion to approve payment of an infant's hospital bill where the parents failed to supply information substantiating eligibility. In Quincy United Methodist v. Commonwealth, Department of Public Welfare, 109 Pa.Commw. 230, 530 A.2d 1026 (1987) the Secretary had discretion to permit an untimely appeal of an audit report. From the authority cited by defendants, the court cannot find the Secretary's power, whatever the extent of it may be, is a substitute for an otherwise invalid appeals process. The cases cited by defendants involve situations wherein the Secretary is waiving mere procedural requirements. In the Stanley case, the Secretary had the discretion to waive the requirement that certain

information be submitted before benefits could be granted. In the Quincy case, the Secretary had the power to waive the time limitation for filing an appeal. Neither of these cases supports the contention the Secretary can waive substantive regulations. WVUH is not requesting a simple time extension or an exception from a technical formality. Rather, it requests a total exemption from the state's entire medicaid reimbursement methodology. It has not been demonstrated the Secretary has the power to grant such a request. The seemingly unfettered discretion of a state official cannot serve as a substitute for a full-blown, meaningful appeals process.

Scope of Relief

In this action plaintiff sues state officials in their official capacities. Thus the state, as the real party in interest, can invoke its sovereign immunity protection under the Eleventh Amendment.[4] Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 (1984). Defendants have raised a sovereign immunity defense to all retrospective relief demanded by plaintiff.

The law on sovereign immunity is not carved in stone. Since the first exception to the Eleventh Amendment was established in 1908, (Ex Parte Young, 209 U.S. 123 (1908)), courts have struggled to define the Amendment's natural boundaries. In Ex Parte Young, supra, the Court held the protection of the Amendment was unavailable in a suit challenging the

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4 The Eleventh Amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

constitutionality of a state official's enforcement of a state law. The sole remedy in Young was prospective relief.

The distinction between retrospective and prospective relief has blurred with courts' attempts to provide meaningful equitable relief to wronged parties. See, e.g., Milliken v. Bradley, 433 U.S. 267 (1977) (Court upheld district court's order requiring state defendants to pay one-half of the costs attributable to remedial measures aimed at curing the effects of prior school segregation); Clark v. Cohen, 794 F.2d 79 (3d Cir. 1986), cert. denied, 479 U.S. 962 (1986) (appeals court upheld district court's order requiring state to provide program of services directed at remedying harm incurred by woman wrongfully confined to a mental institution). Although there is no bright line distinction, the differences between the two types of relief are discernible. In Brown v. Eichler, 664 F.Supp. 865 (D.Del. 1987), the court efficiently summarizes the boundaries of appropriate remedies allowable under the Eleventh Amendment.

> The distinction between retrospective and prospective relief depends not on when the relief is awarded but on when the violation for which relief is awarded occurs. All relief, whether damages or injunctive, must be given in the future. If that relief is aimed at remedying a past harm, it is considered retrospective relief and barred by the Eleventh Amendment. By contrast, a remedy aimed at curing a present violation in the future is considered prospective relief. Last, direct awards of monetary relief against the State are forbidden, while awards with only an ancillary effect on the State treasury are permissible.

Id. at 872-73 (citing Quern v. Jordan, 440 U.S. 332 (1979)).

Assuming the court orders defendants to develop a new appeals system, WVUH asks this court to order defendants to

permit the Hospital to appeal its fiscal years 1984 and 1985 reimbursements under the new appeals system. This request is nearly identical to that of the plaintiffs in Brown. In that case, the plaintiffs challenged Delaware's federal tax refund intercept program. The court found state procedures violated the due process rights of obligated parents and non-obligated spouses of obligated parents due to a failure to inform them of potential defenses. The plaintiffs requested the court to enjoin the state to re-do the past procedures for the 1983 and 1984 intercept of refund checks using the new court-ordered procedures. The 1983 intercept occurred before the action was commenced; the 1984 intercept occurred afterwards. The court addressed the two intercepts separately. The court's framing of the sovereign immunity issue regarding the 1983 intercept works quite well for the framing of the sovereign immunity issue in the instant action for the fiscal years 1984 and 1985. The Brown court stated the issue thusly:

> The question for this Court with respect to the 1983 intercept is whether an injunction aimed at remedying a past due process violation that only has an ancillary effect on the state treasury -- only new hearings will be required; there will not be a direct award of money -- can be issued in the context of a case where there is an ongoing state official's violation of federal law, but the injunction for new hearings for the past is not needed to remedy the situation for the future.

Id. at 873 (footnote omitted).

In the instant action, the court is concerned with an on-going state official's violation of federal law; the requested injunction would have only an ancillary effect on the state treasury; and the injunction would be aimed at remedying a past violation. The unusual combination of factors involved in the question of relief in this situation was not lost on the Brown court.

That court noted: "This question is a somewhat anomalous one because the relief requested is neither retrospective monetary relief nor prospective injunctive relief. Instead, it is retrospective, injunctive relief." Id.

Two Supreme Court cases, Milliken v. Bradley, supra, and Quern v. Jordan, 440 U.S. 332 (1979) contained some element of retrospective relief and bear examination. In the school segregation case, Milliken, the relief was aimed at eliminating

> the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers. That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system.

422 U.S. at 290. Although the violation was antecedent, it caused deficiencies in the students which, if not remedied, would continue to harm them far into the future.

In the Quern case, the Court held a federal court could order state officials to send a notice to victorious plaintiff class members informing them, "that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue." 440 U.S. at 332. The Court found such a notice would not lead "inexorably" to the state paying past benefits. The chain of causation between the sending of the notice and the payment of benefits retroactively

> is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice ... simply apprises

> plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits.... [W]hether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court.

Id. at 347-48 (footnote omitted). The court viewed the notice and its possible retrospective element as ancillary to the prospective relief already ordered. In a later Supreme Court case, Green v. Mansour, 474 U.S. 64 (1985), the Court characterized the sending of the Quern notices as a "mere case-management device." Id. at 71.

The distinctions between the instant action and Milliken, Quern, and the Third Circuit's Clark (discussed briefly supra at pages 62-63 of this memorandum), are determinative on the issue of sovereign immunity. In Milliken and Clark it was determined the plaintiffs would continue to suffer harm because of violations visited upon them in the past by their respective state officials. The relief in those cases was aimed at eradicating those continuing harmful effects; the relief was not aimed at compensating those plaintiffs for harm done and past. In the instant action, the only continuing harm is the unrecovered loss of money. While the court is not insensitive to WVUH's sizeable monetary loss, the court cannot order relief which will almost certainly result in the recovery of money for the sole purpose of recovering money. The court cannot order the plaintiff be made whole if it is money only which it needs to be made so. Like the violations in Brown, the violations in the case at bar are "discrete for each year." Brown, 644 F.Supp. at 874. There is a continuing effect on the Hospital caused by its having been denied money it was entitled to, but the nature of that harm is not such that it will affect the future of the institution in a fundamental way. The court has recognized WVUH cannot continue to sustain the level

of losses it has been sustaining and still be certain of providing the services it does presently. However, there is nothing in the record which informs the court that recovery of the alleged 2.3 million dollars owed it for the fiscal years 1984 and 1985 are crucial to the Hospital's future viability.

The Quern situation appears to be somewhat closer to plaintiff's than the other cases discussed, but it too is meaningfully distinguishable. In Quern, the approved notice gave no more to the class members "than what they would have gathered by sitting in the courtroom.[...]" 440 U.S. at 349 (quoting Jordan v. Trainor, 563 F.2d 873, 878 (7th Cir. 1977), aff'd sub nom., Quern v. Jordan, supra). The court approved only of plaintiffs being notified of a possibility of consideration for past benefits. It was not at all certain the sending of the notice would have any effect on the state's treasury (beyond the cost of sending it -- which was not objected to by the state). In the instant matter there is no class; there is only one plaintiff. WVUH need not be specially notified of the status of its federal court case, as did the Quern plaintiffs. The Quern notice advised plaintiffs of the existence of the administrative process available to them generally. It was not directed specifically to facilitate awards of past benefits. That past benefits might be available was ancillary to the prospective relief regarding availability of future benefits. In contrast to this is WVUH's request which focuses only on the collection of money allegedly owed for past violations. There is no prospective component to what the Hospital requests. Its requested relief goes only to compensation for past violations. The court is aware that even if it were to order the state to permit WVUH to appeal its fiscal years 1984 and 1985 rates under a new system, a system developed in keeping with this memorandum, there is no guarantee the Hospital would collect a specific dollar amount. However, assuming the development of a valid, constitutional methodology, reimbursement rate, and appeals system, WVUH would undoubtedly qualify for some compensation.

Finally, as the Brown court observed,

> [1]ying at the core of the prospective-retrospective distinction in the Eleventh Amendment jurisprudence is the inherent tension between state sovereign immunity and the Federal Supremacy Clause.[12] [5] '[T]he availability of prospective relief of the sort awarded in Ex Parte Young gives life to the Supremacy Clause.... But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.' ...[Green v. Mansour, 474 U.S. 64, 68 (1985).] A balance between the constitutional provisions has been struck at the point of the retrospective-prospective distinction. When the purpose of a remedy is only to compensate for the past violations, the Eleventh Amendment takes precedence over the Supremacy Clause.

Brown, 664 F.Supp. at 875 (emphasis added). The court finds the sole purpose for WVUH's requested relief of ordering the state to entertain an appeal for the years 1984 and 1985 is to compensate for past violations. The Eleventh Amendment bars such compensation.

The court finds, however, the Eleventh Amendment does not bar an injunction ordering the state to permit the Hospital to appeal the reimbursements it received from the date the complaint was filed. Brown, 664 F.Supp. at 876; Smith v. Onondaga County Support Collection Unit, 619 F.Supp. 825 (N.D.N.Y. 1985). Although such an appeal is aimed at curing past reimbursement deficiencies, this relief, when first requested by

---

5 "12. 'This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land.' U.S. Const. art. VI [cl.2.]"

WVUH, was prospective. Ordering the state to conduct appeal hearings for the period of time after the complaint was filed is a proper ordering of prospective, injunctive relief. Brown, 664 F.Supp. at 876. However, this court cannot order a recovery of money damages. Id. at 876 n.13.

Conclusion

The court finds Pennsylvania's prospective medicaid program as it applies to WVUH does not comply with federal law; through its treatment under the program, WVUH's Fourteenth Amendment equal protection rights have been violated; and the administrative appeals system, as it applies to WVUH, is inadequate and does not comply with federal law. An appropriate order will issue.

Sylvia H. Rambo
United States District Judge

Dated: November 30, 1988

ORDER

In accordance with the accompanying memorandum, **IT IS HEREBY ORDERED THAT:**

1) the court declares the Commonwealth of Pennsylvania's medicaid prospective payment system as it applies to West Virginia University Hospital is violative of federal law;

2) the court declares the Commonwealth of Pennsylvania's medicaid administrative appeals system as it applies to West Virginia University Hospital is violative of federal law;

3) the court declares plaintiff's Fourteenth Amendment equal protection rights have been violated as a result of its treatment under the Commonwealth of Pennsylvania's medicaid prospective payment system;

4) defendants shall, within ninety (90) days of the entry of judgment, formulate (and seek approval of same from the appropriate federal authority) a methodology and a medicaid prospective payment system for West Virginia University Hospital consistent with and in conformity with federal law as discussed in the accompanying memorandum;

5) defendants shall, within ninety (90) days of the entry of judgment, formulate (and seek approval of same from the appropriate federal authority) an adequate and meaningful (as those terms are used in the accompanying memorandum) medicaid administrative appeals or exception system for West Virginia University Hospital;

6) defendants shall permit West Virginia University Hospital to utilize the new appeals or exception system to challenge its reimbursements from the date this action was commenced;

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,	)	
Plaintiff,	)	
	)	CIVIL ACTION NO. 86-0955
	)	(Judge Rambo)
v.	)	
ROBERT CASEY, ET AL.,	)	
Defendants.	)	

MEMORANDUM

Background

On November 30, 1988 this court granted plaintiff's request for attorney's fees pursuant to 42 U.S.C. Section 1988 (Section 1988) and ordered the parties to submit a joint proposal on the fees amount. On December 14, 1988 the parties submitted a joint proposal asking the court to determine that $500,000 is the appropriate amount of attorney's fee. Of that $500,000 figure, $350,000 is attributable to attorney's fees, $104,133 is attributable to expert witness fees and costs, and $45,867 is attributable to disbursements.

In the proposal, it is stated:

> The parties ... agree that $104,133 is a fair and reasonable amount for the services of ... [plaintiff's expert witnesses], that such services were necessary, and that WVUH [plaintiff] actually incurred such costs. However, defendants do not agree that

> WVUH is entitled to reimbursement of expert witness fees as a matter of law.

Joint fee proposal at 7. The issue of plaintiff's entitlement to expert witness fees has been fully briefed and it is addressed herein.

Discussion

While there is no Third Circuit Court of Appeals case directly on point, it has been understood, and it is not disputed, that under Section 1988, district courts may grant reasonable costs to successful civil rights litigants. E.g. Rank v. Balshy, 590 F. Supp. 787, 801 (M.D. Pa. 1984) citing Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201, 204-206 (1981). These costs may include expert fees "when the expert's testimony is indispensable to the determination of the case." Roberts, 651 F.2d at 206.

The parties have stipulated that plaintiff's experts were necessary. However, it is incumbent upon the court to note its reliance on the testimony of plaintiff's expert witnesses. Their testimony was essential to an understanding of the theories, issues, and facts crucial to the court's analysis and ultimate factual and legal determinations. Thus, assuming an award of expert fees is permitted by law, such an award is fully warranted in this case.

The defendants base their assertion that expert fees are no longer available under Section 1988 on the United States Supreme Court decision in Crawford Fitting Company v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494 (1987). A victorious defendant in an employment discrimination action sought expert witness fees, as costs, in an amount in excess of the 28 U.S.C. Section 1921 limit of $30.00 per day. The Court held that district courts are bound by the $30.00 limit "absent contract or explicit authority to the contrary." Crawford, 482 U.S. at ____, 107 S. Ct. at 2496.

This language appears all-encompassing. However, three Justices specifically made reference to Crawford's non-applicability to Section 1988. Justice Blackmun's concurrence states in total:

> I join the Court's opinion and its judgment but upon the understanding that it does not reach the question whether, under 42 U.S.C. Section 1988, a district court may award fees for an expert witness. See post, at 2500, n. 1 (MARSHALL, J., dissenting).

Id. at ____, 107 S. Ct. at 2499. The footnote Justice Blackmun refers to states in pertinent part: "I do not understand today's decision to decide the question whether a district court may award expert witness fees under 42 U.S.C. Section 1988." Id. at _____, 107 S. Ct. at 2500. Justice Brennan joined Justice Marshall in his dissent.

Although the third circuit has not had occasion to address Crawford's applicability to Section 1988 awards, a number of district courts and two appeals courts have determined that Crawford's reach does not extend to Section 1988. E.g., Freeman v. Package Machinery Company No. 88-1130 (1st Cir. Nov. 22, 1988) (Westlaw); SapaNajen v. Gunter, 857 F.2d 463 (8th Cir. 1988); Black Grievance Committee v. Philadelphia Electric Co., 690 F. Supp. 1393 (E.D. Pa. 1988); Hillburn v. Commissioner, Connecticut Dept. of Income Maint., 683 F. Supp. 23 (D.Conn. 1987), aff'd mem., 847 F.2d 835 (2d Cir. 1988); United States v. Yonkers Board of Ed., 118 F.R.D. 326 (S.D.N.Y. 1987). Two fourth circuit courts, uncertain of Crawford's reach, have declined to rely on Crawford in denying expert witness fees. Harris v. Marsh, 679 F. Supp. 1204 (E.D.N.C. 1987) (because court was not certain whether Crawford reached the Section 1988 issue, in denying expert witness fees, it relied on a fourth circuit case, Wheeler v. Durham City Bd. of Ed., 585 F.2d 618 (4th Cir. 1978); Ecos, Inc. v. Brineger, 671 F. Supp. 381 (M.D.N.C. 1987) (court relied on Wheeler, 585 F.2d 618 in denying expert witness fees,

and characterizes Crawford merely as "persuasive authority" because it did not address Section 1988 directly); cf. Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987) cert. denied ___ U.S. ___, 108 S. Ct. 1735 (1988) (noting Crawford did not specifically address the issue of fees under the Voting Rights Act, 42 U.S.C. Sections 1973-1974, the court construed Crawford's "general reasoning" as dispositive on the issue and denied any award for expert witness fees).

Conclusion

Despite a good effort by defendants to convince us otherwise, we find Crawford does not affect our circuit's law on the issue of expert witness fees under Section 1988. The fact-specific application of the Crawford decision, coupled with the emphatic statements of three Justices regarding the decision's inapplicability to Section 1988, make departing from accepted practice unattractive. Plaintiffs are entitled to expert witness fees. An appropriate order will issue.

SYLVIA H. RAMBO
United States District Judge

Dated: January 30, 1989

NO. 89-994

Supreme Court, U.S.
FILED
JAN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WEST VIRGINIA UNIVERSITY
HOSPITALS, INC.,
Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE CASE

1. After a six day non-jury trial, the District Court declared that Pennsylvania's system of reimbursing out-of-state providers of Medicaid services, such as petitioner, violated federal statutory and constitutional law (42 U.S.C. § 1396a(a)(13)(A) and the Fourteenth Amendment), and awarded the petitioner attorney's fees under 42 U.S.C. § 1988. Pet. App. at B-67 and 68. The District Court directed counsel to submit a joint fee proposal. Pet. App. at B-68 and C-1.

The joint fee proposal listed $350,000 attributable to attorney's fees, $104,133 attributable to expert witness fees and costs and $45,867 attributable to disbursements. Pet. App. at C-1. The respondents argued that the District Court could not award

under 42 U.S.C. § 1988 any portion of the claimed expert witness fees and costs of $104,133, "bas[ing] their assertion that expert witness fees are [not] available under Section 1988 on ... Crawford Fitting Company v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494 (1987)." Pet. App. at C-2.

The District Court disagreed with the respondents, finding that "Crawford does not affect our circuit's law on the issue of expert witness fees under Section 1988," and awarded the full amount claimed. Pet. App. at C-4.

2. In the Court of Appeals, respondents challenged the award of expert witness fees and the Court of Appeals agreed with them, ruling that 42 U.S.C. § 1988 "as presently drafted does not authorize expert fee awards in excess of the statutory cap of thirty

dollars per day provided in [28 U.S.C. §] 1821(b)." Pet. App. at A-48.

The Court of Appeals followed Crawford, stating that it "seems to dictate that, even in the case of a fee shifting statute such as section 1988, a court may not award fees in excess of the statutory maximum of thirty dollars a day unless the fee shifting statute expressly makes such an allowance." Pet. App. at A-46. The Court of Appeals noted the Court's "disfavor for '[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in sections 1920 and 1821 without plain evidence of congressional intent to supersede that section'" and noted the Court's admonition in Crawford that it "will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any

other provision not referring explicitly to witness fees." Pet. App. at A-46.

Accordingly, "constrained by the language of Crawford", and "defer[ring] to legislative fiat", the Third Circuit "abandon[ed] [its] previous rule" and "limit[ed] expert witness fees to thirty dollars a day." Pet. App. at A-47.

The Hospital has petitioned for certiorari on this issue and the respondents oppose the granting of such a writ for the reasons which follow.

REASONS FOR DENYING THE WRIT

A. The Petition Presents No Important Issue for Resolution.

In ruling that expert costs were limited to the statutory rate of thirty dollars per day prescribed by 28 U.S.C. § 1821, the Court of Appeals did no more than to apply correctly the straightforward holding of Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The petition therefore presents no difficult or important issue for resolution by the Court.

In Crawford, the Court held "that when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of 28 U.S.C. § 1821, absent contract or explicit statutory authority to the contrary." Id. 482 U.S. at 439. The Court pointed out that

Congress in enacting 42 U.S.C. § 1988 only broadened the "availability of attorney's fees" and that Congress "has not otherwise 'retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors'." Crawford, 482 U.S. at 444. Section 1988 does not permit a court to award a reasonable expert witness fee as part of the costs nor does it allow the court to award a reasonable expert witness fee as part of the reasonable attorney's fee which may, under 42 U.S.C. § 1988, be awarded as part of the costs.[1] This is true even if "the use of the experts was 'indispensable to the determination of the case'

---

[1]For example, the Clean Air Act, 42 U.S.C. §7604(d), expressly provides for attorneys fees and expert witness costs. When Congress wants to allow these, it says so.

or 'played a crucial role in the resolution of the issues presented'". Black Grievance Committee v. Philadelphia Electric Co., 690 F.Supp. 1393, 1404 (E.D.Pa. 1988) (quoting Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201 (3d Cir. 1981)).

Pursuant to 28 U.S.C. § 1821, witness fees are limited to flat daily attendance fees and subsistence allowances. No provision is made for compensation of experts. Crawford, 482 U.S. at 445. Because Congress provided no relief from 28 U.S.C. § 1821's limits as to expert witness fees when it enacted 42 U.S.C. § 1988, the rule remains "that a federal court may tax expert witness fees in excess of the thirty dollar day limit set out in § 1821 only when the witness is court appointed." Crawford, 482 U.S. at 442.

The Court of Appeals properly reversed the District Court, following the clear direction of the Court in Crawford.[2]

---

[2]Other jurisdictions agree with the Third Circuit, and have relied on Crawford to limit or deny expert fees. See ECOS v. Brinegar, 671 F.Supp. 381 (M.D.N.C. 1987) (expert witness fees denied in a § 1983 case); Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989) (expert witness fees denied under Title VII, 42 U.S.C. § 2000e-5(k)); Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987) (expert witness fees denied under the Voting Rights Act, 42 U.S.C. § 1973l(e)); Huertas v. East River Housing Corp., 674 F.Supp. 440 (S.D.N.Y. 1987) (expert witness fees denied under Title VII, Fair Housing Act, 42 U.S.C. § 3601, et seq., and 42 U.S.C. §§ 1981 and 1982); Freeman v. Package Machinery Company, 48 E.P.D. ¶38,456 (1st Cir. Nov. 2, 1988) (CCH) (Crawford casts "doubt . . . the district court's ability to award expert witness fees in excess of the $30-per-day ceiling. ..." 48 E.P.D. at 54,566); See also Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988) (§ 1983 action but claim for fees addressed to the general equitable powers of the court); Davis v.

(FOOTNOTE CONTINUED ON NEXT PAGE.)

Missouri v. Jenkins, No. 88-64 slip op. (U.S. June 19, 1989), cited by petitioner, does not cast doubt on the holding of Crawford. Jenkins did not concern reimbursement for expert witness fees, as did Crawford, and the result in Jenkins was therefore not circumscribed by the limits of 28 U.S.C. § 1821. Rather, Jenkins allowed compensation for law clerks and paralegals, members of an attorney's staff, as a component of a reasonable attorney's fee pursuant to 42 U.S.C. § 1988. Because these employees were not witnesses, 28 U.S.C. § 1821 did not come into play, and there is thus no tension between the holdings in Crawford and Jenkins.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE.)

Richmond, Fredericksburg and Potomac R.R., 803 F.2d 1322 (4th Cir. 1986) (Title VII, 42 U.S.C. § 2000e (pre Crawford) (§ 1988 does not provide statutory authority to award compensation for non-legal experts).

B. The Petition Does Not Establish a Conflict Among the Circuits.

Petitioner relies heavily on what it calls a "multi-circuit conflict" in which the decisions of the First, Third, and Fourth Circuits are pitted against those of the Seventh, Eighth and Tenth. Pet. at 6. Petitioner exaggerates.

The Seventh Circuit's decision in Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), is inapposite. Although the Court of Appeals purported to answer the question of "whether the judge in a civil rights case may order the losing party to reimburse the cost incurred by the winner to hire an expert witness" id. at 512-513, the Seventh Circuit had already established, before Crawford, the rule that "lawyers' out-of-pocket expenses of travel, investigation,

and other trial preparation," were awardable under 42 U.S.C. § 1988. Id. at 513. No one challenged this rule in the appeal before the Seventh Circuit, ibid., and that court's comments on the issue are therefore no more than dicta.[3]

The Eighth Circuit in SapaNAJIN v. Gunter, 857 F.2d 463 (8th Cir. 1988), disposed of the issue perfunctorily, in one paragraph with little or no analysis,

---

[3]Moreover, Jenkins did not, as suggested in Friedrich, "read the statute [§ 1988] to allow as part of the 'reasonable attorney's fee' the award of paralegal fees, even though paralegals are not attorneys," 888 F.2d at 513. That issue had been conceded by Missouri in Jenkins. Also, the statement in Friedrich that "'reasonable attorney's fee' s a shorthand expression for such fees and other expenses as the District Court might in the exercise of its equitable descretion reasonably believe should be reimbursed to the prevailing party," 888 F.2d at 518, is dictum.

id. at 465, and without the benefit of the Third Circuit's thorough analysis in this case.

Finally, the Tenth Circuit decided Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) four years before Crawford. Given the Court's direction in Crawford, the Tenth Circuit might well decide the issue differently today.

The Court is thus not yet faced with a square conflict among the Circuits, if indeed it will ever be. It would be premature for the Court to step in and settle a conflict which further developments may prove illusory. In the meantime, this issue will benefit from further seasoning in the lower courts.

CONCLUSION

The petition for certiorari of West Virginia University Hospitals, Inc. should be denied.

Respectfully submitted,

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(3)

No. 89-994

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 22, 1989
CERTIORARI GRANTED FEBRUARY 26, 1990

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The other opinions of the Court of Appeals and the District Court are set forth in the Appendix to the Petition for Certiorari

U.S. DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA (HARRISBURG)

CIVIL DOCKET FOR CASE #: 86-CV-955

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.
v. CASEY, ET AL

Date	No.	Proceedings
		MEMO AND ORDER
11/30/88	98	1) The court declares the Com. of Pa's medicaid prospective payment system as it applies to W.VA U. Hospital is violative of federal law. 2) The Ct. declares the Com. of Pa's medicaid administrative appeals system as it applies to W.VA U. Hospital is violative of federal law. 3) The Ct. declares plntf's 14th amend. equal protection rights have been violated as a result of its treatment under the Com. of Pa's medicaid prospective payment system. 4) Defts. shall within 90 days of the entry of judg. formulate a methodology and a medicaid prospective payment system for W. VA U. Hospital consistent w/& in conformity w/fed. law as discussed in the memo. 5) Defts. shall within 90 days of the entry of judg. formulate an adequate & meaningful medicaid administrative appeals or

exception system for W. VA U. Hospital.

6) Defts. shall permit W VA U. Hospital to utilize the new appeals or exception system to challenge its reimbursements from the date this action was commenced.

7) Mtns. for reconsideration shall not be filed. However, the Ct. will entertain mtns. to clarify this order to ensure it is consistent w/the body of the memo.

8) Plntf's request for atty. fees pursuant to 42 USC 1988 is granted. Counsel for the parties shall attempt to agree on the amt. of said fees. On or before 12/14/88 counsel shall submit a joint fee proposal to the Ct., or if no agreement can be reached, counsel shall separately file fee proposals.

9) Judg. will be entered upon the Ct.'s determination of appropriate attys. fees

10) Defts. mtn. to file suppl. briefs is denied. cc: All counsel, all judges, Sec.

12/14/88	99	JOINT FEE PROPOSAL - of counsel re: atty.'s fees & costs w/exhs. (c/s) amsb
12/15/88	101	DECLARATION - unsworn of Atty. Stover (c/s)
01/30/89	105	MEMO - of Ct. AND ORDER - IT IS HEREBY ORDERED THAT: 1.) Pltf. is awarded $500,000 in attorney's fees and

costs pursuant to 42 U.S.C. Sec. 1988, and 2.) The Clerk of Court is directed to enter judgment in accordance with the foregoing award and in accordance with the order of Nov. 30, 1988 (Doc. of Rec. No. 980; and 3.) The Clerk of Court shall close the file. (R) cc: Stover, Macon, Foerster, Bartels, Ct. 4 copies & All Judges & Orig. to Security. gtg

01/31/89	106	JUDGMENT - IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the pltf. as to Attorneys Fees and Costs in the amt. of $500,000 and against the defts. pursuant to 42 U.S.C. 1988. (R) cc: Stover, Macon, Foerster, Bartels, Ct. 4 copies all judges & Orig. to Sec.
01/31/89	107	JUDGMENT - IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the pltf. and against the defts. as follows: 1.) the Ct. declares the Commonwealth of Pa's medicaid prospective payment system as it applies to West Virginia University Hospital is violative of federal law. 2.) the Ct. declares the Commonwealth of Pa's medicaid administrative appeals system as it applies to West Virginia University Hospital is violative of federal law. 3.) the Court declares pltf's Fourteenth Amendment equal

protection rights have been violated as a result of its treatment under the Commonwealth of Pa's medicaid prospective payment system.

4.) Defts. shall, w/in (90) days of the entry of judgment, formulate (and seek approval of same from the appropriate federal authority) a methodology and a medicaid prospective payment system for West Virginia University Hospital consistent with and in conformity with federal law and discussed in the memorandum of November 30, 1988.

5.) Defts. shall within ninety (90) days of the entry of judgment, formulate (and seek approval of same from the appropriate federal authority) an adequate and meaningful (as those terms are used in the memorandum of November 30, 1988 medicaid administrative appeals or exception system for West Virginia University Hospital;

6.) Defts. shall permit West Virginia University Hospital to utilize the new appeals or exception system to challenge its reimbursements from the date this action was commenced. (R) cc: Stover, Macon, Foerster, Bartels, Ct. 4 copies all judges & Orig. to Security.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NO. 89-5165

WEST VIRGINIA UNIVERSITY HOSPITALS, INC. v.
CASEY, ET AL.

Date	Proceedings
09/05/89	Signed Opinion. Judgment affirming, etc.; reversing; vacating, etc. with two-thirds of WVUH's costs on appeal are taxed against the appellants.
09/18/89	Petition for Rehearing of WVUH.
10/05/89	Petition for Rehearing of WVUH Denied.
10/18/89	Application by WVUH, Inc. for Attorneys' Fees in the amount of $134,763.97 and an award of Expenses in the amount of $7,510.27, filed. w/service.
10/30/89	Answer by Appellants to the application for attorneys' fees, filed. w/serv.
11/03/89	Reply by WVUH, Inc. to the Objections filed by Appellants to application for attorneys' fees, Received only.
11/7/89	Order (Becker, Stapleton and Rosenn Cir. Judges) Ordering that counsel for appellants supplement their answer within ten days from the date of this order with copy to counsel for the appellees, with the following:

1) A detailed and specific analysis of how much reduction in hours and fees should be made under Hensley v. Eckerhart, 461 U.S. 424 (1983), in light of appellants' contention that WVUH lost on three issued (paragraph 7 of answer) that were significant, and appellee's reply thereto.

2) Whether it is appellants' contention that there should also be a reduction in fees because the lawyers applied too much time to certain matters or too many lawyers were engaged in the performance of a particular service and if so the specific items to which objection is made, the reduction requested as to each and the reasons therefor.

3) The specific items to which objection is taken because the services were rendered in the DC, the reasons why this Ct. may not award fees as to WVUH's efforts to enforce compliance with the DC's judgment in light of appellee's reply the specific items to which obj. is made for services rendered between the time of the DC's judgment and the perfection of the appeal, and the specific amount of hours and sums that reasonably should be deducted from WVUH's claim for fees.

4) Specific entries in the exhibits that are objected to because of non-specificity and the reasons why those items require greater detail and the nature of the specificity requested. The appellees shall have ten days after receipt of the appellar.''s supplemental submissions to reply, filed.

11/20/89	Supplement to Appellants' Answer to Appellee's Application for Counsel Fees, filed.
11/30/89	Motion by WVUH, Inc. to Amend Application for Attorneys' Fees and Expenses, filed.
11/30/89	Reply of WVUH, Inc. to appellants' Supplemental Objections to Application for fees and expenses, filed.
12/06/89	Answer by Appellants to appellee's motion to amend application for attorneys' fees and expenses, filed.
01/16/90	Notice of Filing Petition for Certiorari by Robert Casey, Gov. of Penna., etc. on January 3, 1990 at Supreme Court. No. 89-1078, filed. There is a separate petition for certiorari filed by WVUH at SC No. 89-994
03/12/90	Opinion Sur Motion for Attorneys' Fees and Costs (Becker, Stapleton and Rosenn, C.JS), filed. For Publication.
03/12/90	Order On Application for Attorney Fees (Chief Deputy Clerk) Granting the amended application in part and awarding attorney fees, etc. It is further ordered that the foregoing award of attorney fees and expenses is made without prejudice to plaintiff's right to make supplemental application to the District Court for reasonable fees and expenses to which it may be entitled in the post-judgment proceedings in that Court, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WEST VIRGINIA UNIVERSITY HOSPITALS, INC., Plaintiff	:	
	:	CIVIL ACTION
vs.	:	
	:	NO. CV-86-0955
RICHARD L. THORNBURGH, et al, Defendants	:	JUDGE RAMBO

STIPULATION

This case involves complex questions of hospital and governmental accounting which require detailed preparation of preliminary studies in order to facilitate meaningful discussions between the parties and to provide for efficient advancement of the case before the Court. Plaintiff has been diligently working to complete work with respect to such undertakings but has been unable to finalize its studies at this juncture. Counsel for Plaintiff believe that such matters can be consummated by December 15, 1986, at which time it is the intention of the parties to schedule conferences to review the status and nature of the claims raised by the Complaint. To facilitate these processes, the parties hereby stipulate as follows:

(1) That the time for Defendants to answer, move or otherwise plead with respect to the Complaint shall be extended indefinitely until such time as

Plaintiff's counsel file a status report with the Court indicating that Plaintiff is prepared to have the case proceed; and

(2) That the scheduling order of this court filed September 15, 1986 is suspended in its entirety as to this case until such time as counsel for Plaintiffs file a status report with the Court indicating that the case is ready to proceed; and

(3) Plaintiff's counsel shall provide a status report to the Court on or before January 15, 1987 with respect to matters relating to this case.

Counsel for the parties respectfully request the confirmation of this Stipulation by the Court.

/s/ Jerome T. Foerster
JEROME FORRESTER, ESQUIRE
OFFICE OF ATTORNEY GENERAL
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

/s/ Jack M. Stover
JACK M. STOVER, ESQUIRE
SHEARER, METTE, EVANS & WOODSIDE
1801 North Front Street
P.O. Box 729
Harrisburg, PA 17108-0729

/s/ Sylvia H. Rambo
JUDGE RAMBO
11/18/86

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRCT OF PENNSYLVANIA

TESTIMONY OF MR. THOMAS MANAK
(May 3, 1988 Transcript)

[178]

DIRECT EXAMINATION AS TO QUALIFICATIONS

BY MS. KREBS:

Q Mr. Manak, what is your present position?

A I am the Director of Financial Services for the Central Region of Coopers and Lybrand.

Q What is Coopers and Lybrand?

A Coopers and Lybrand is an international and national public accounting firm.

[179]

Q I am sorry?

A It is a national and international public accounting firm.

Q And what do you do as the Director of Financial Services of the Central Region?

A I am responsible for all financial consulting engagements that we are engaged to do out of that office, out of our Chicago office. Those engagements may be within our central region or throughout the country.

Q What does the central region include?

[179 (cont'd)]

A It encompasses a nine state area in the Midwest.

Q A what?

A A nine state area in the Midwest.

Q What types of financial or what types of engagements -- I think you used that word -- do you do for Coopers?

A It is a very wide variety of engagements including reimbursement, financial consulting in general, mergers and acquisitions, financial forecasts for hospitals and other acute care and long term care providers.

Q What kind of work do you do specifically in the area of reimbursement?

A In the area of reimbursement, we analyze Medicare and Medicaid regulations by consulting to our clients, assist in appeals to the Provider Reimbursement Review Board, assist them in trying to improve the payments from the third [180] parties.

Q Do you have occasion in that position that you now hold to review payment methodologies for Medicaid programs in different states?

A Yes, I do.

Q Have you in fact done that?

[180 (cont'd)]

A As part of Medicaid engagements and other types of consulting engagements for various clients, in order to understand how they get paid, it is necessary to analyze the various different payment methodologies by the large payers which would include Medicare, Medicaid and other commercial payers.

Q Have you specifically analyzed or sought to familiarize yourself with the Medicaid payment methodologies in different States?

A Yes, I have

Q Could you identify for us what those State methodologies are or the States in which those methodologies apply?

A THE COURT: May I have the question again?

BY MS. KREBS:

Q Could you please identify for us the State methodologies for Medicaid payment with which you are familiar?

A I am confused about the question you asked. Are you [181] asking the State methodologies or the States in which we have done work which included analyzing payment methodologies?

Q Let's me try that question first. In what States have you worked in which you have had to evaluate and familiarize yourself with payment methodologies?

[181 (cont'd)]

A I will give you a representative list. It includes California, Arizona, New Mexico, West Virginia, Virginia, Pennsylvania, District of Columbia, Maryland, and there are other States.

Q Have you familiarized yourself with the Medicaid payment methodologies of different States?

A Yes, I have.

Q What State -- what Medicaid payment methodologies are you familiar with?

A There are various different types of payment methodologies. Each State can do it somewhat differently. In California, for example --

THE COURT: Are we really interested in the other States?

MS. KREBS: Your Honor, I am trying to establish a foundation for his expert testimony.

THE COURT: He has already stated that he named various States, and he is familiar with the methodologies of those States.

MS. BARTELS: Your Honor, I will stipulate that he [182] is testifying as an expert generally in hospital reimbursement. If they want to develop an expertise in the Pennsylvania system, I think they will need to go further. But in general, as far as hospital finance and hospital reimbursement, we have no objection to his testifying as an expert in that area.

MS. KREBS: Fine.

[182 (cont'd)]

BY MS. KREBS:

Q Mr. Manak, were you retained by West Virginia University Hospital to help it with this case?

A Yes.

Q What specifically were you asked to do?

A We were asked to do a number of things. We were asked to analyze the payment methodology in the State of Pennsylvania for out-of-state hospitals and in-state hospitals. We were to look at the payment amounts that were received by the hospital and also what the payment would be if they were an in-state hospital.

Q Have you reviewed any documents, Mr. Manak, to help you with that assignment?

A Yes, I have.

Q Mr. Manak, what I would like to do is hand you several different documents and ask you whether you have reviewed these documents. Mr. Manak, I am handing you a document. Could you [183] identify it please and tell the Court whether you have reviewed it?

A This is the Defendants' Answers to Plaintiff's First Set of Interrogatories in this case. Yes, I have reviewed it.

Q Mr. Manak, there are multiple sets here. When I say multiple sets, there are multiple documents bound within that document?

[183 (cont'd)]

A Also in the document is Defendants' Answer to Plaintiff's Second Set of Interrogatories.

Q Have you reviewed that document, sir?

A Yes, I have. There is also the Defendants' Supplementary Answers to Plaintiff's Second Set of Interrogatories.

Q Have you reviewed that document, sir?

A Yes, I have. There is also the Defendants' Second Set of Supplementary Answers to Plaintiff's Second Set of Interrogatories.

Q Mr. Manak, have you reviewed that document?

A Yes, I have.

MS. KREBS: I would like to identify this at this point and ask that the Court admit these documents into the record of this proceeding. They are all documents that were generated during the discovery process and the course of this trial. They have been sworn to under oath.

[184]

MS. BARTELS: No objection, Your Honor.

THE COURT: It is admitted. Do we have a document number?

[184 (cont'd)]

MS. KREBS: I guess we would mark it. We will mark it as Plaintiff Exhibit 68.

(Plaintiff Exhibit 68 was introduced and admitted into evidence.)

BY MS. KREBS:

Q Mr. Manak, I am going to hand you a series of documents which are from the Defendants and ask you whether you have reviewed these documents. I have got a fairly lengthy list here. What I would ask you to do is identify for the Court what the document is, and then I will ask you whether you have reviewed it.

THE COURT: And the number.

(List of Medicaid cases seen by WVUH for 1984-85 showing amount paid was introduced as Defendants Exhibit 73.)

BY MS. KREBS:

Q I am handing you now Defendants Exhibit 73.

A This is a listing of cases that were seen by West Virginia University Hospital of Pennsylvania Medicaid patients grouped by diagnostic related group for fiscal year 1984-1985. It has other data on that, but it is all in order of DRG.

[185]

Q And what does it show specifically?

[185 (cont'd)]

A It shows the amount paid to West Virginia University Hospital for each DRG, the total charges related to that DRG for those patients, the hospital average length of stay, the statewide -- the Pennsylvania statewide average length of stay, the number of cases and the relative value.

Q Have you reviewed this document prior to coming into this courtroom?

A Yes, I did.

Q Did you review it for the work you have done as part of this engagement?

A Yes, I have.

(List of Medicaid cases seen by WVUH for 1985-1986 showing amount paid was introduced as Defendants Exhibit 74.)

BY MS. KREBS:

Q I am handing you, Mr. Manak, Defendants Exhibit 74. What is this document, sir?

A This document is identical to the Defendants Exhibit 73 except it is for fiscal year 1985-1986.

Q Have you reviewed that document, sir?

A Yes, I have.

[185 (cont'd)]

Q And also with respect to the work you have done in this case?

A Yes.

[186]

(List of Medicaid cases seen by WVUH for 1986-1987 showing amount paid was introduced as Defendants Exhibit 75.)

BY MS. KREBS:

Q I am handing you the Defendants Exhibit 75. What is this document, sir?

A Again, this data is the same type of data, the same categories, by DRG for West Virginia University Hospital for Pennsylvania Medicaid patients seen by the hospital but for fiscal year 1986-1987.

Q Have you reviewed this document, Mr. Manak, for the work that you did in this case?

A Yes, I have.

(Out-of-state Medicaid Expenditures in order of amounts paid was introduced as Defendants Exhibit 80.)

BY MS. KREBS:

Q I am handing you Defendants Exhibit 80. Would you identify it, please?

[186 (cont'd)]

A This exhibit is identified as out-of-state Medicaid expenditures or service year, fiscal year 1984-1985. It shows by facility for out-of-state facilities total dollars paid, total days, total charges and average payment, case mix index, average length of stay and the number of cases -- Pennsylvania Medicaid cases that are seen by each one of those hospitals.

[187]

Q Each of these hospitals that is listed on the far left-hand corner is an out-of-state hospital?

A Yes, it is.

Q And have you reviewed this document, sir?

A Yes, I have.

(Out-of-state Medicaid Expenditures ranked by cases was introduced as Defendants Exhibit 81.)

BY MS. KREBS:

Q I am handing you, Mr. Manak, Defendants Exhibit 81. Could you identify it, please?

A This is similar to Defendants Exhibit 80, the same type of data for out-of-state hospitals that see Pennsylvania Medicaid patients, but for --

Q Did I give them to you out of order?

[187 (cont'd)]

A No, this is a duplicate.

Q Okay. Let me hand you this one then, sir. I am sorry.

THE COURT: 81 is withdrawn?

MS. KREBS: 81 appears to be duplicate of 80. I will have to check, Your Honor.

MS. BARTELS: Your Honor, I believe we can clarify that. One is ranked by cases, and one is ranked by dollars paid. They are the same information ranked in different orders.

MS. KREBS: I will come back to that, Your Honor.

BY MS. KREBS:

[188]

Q Can you based on your review, Mr. Manak, explain what the difference is between those two?

A Yes. The difference is in rank order. The data is the same. It is just a different sort of the data -- one by number of cases with the highest volume first, and in Defendants Exhibit 80 it is in order of total dollars paid to the out-of-state facility.

Q Have you reviewed both Exhibits 81 and Exhibit 80 in preparing for your work here?

A Yes, I have.

[188 (cont'd)]

(Information in re: PA Medicaid cases seen by out-of-state hospitals with amounts paid was introduced as Defendants Exhibit 82.)

BY MS. KREBS:

Q Could you identify for me Exhibit 82, Defendants Exhibit 82?

A Defendants Exhibit 82 is again information regarding Pennsylvania Medicaid cases seen by out-of-state hospitals for fiscal year 1985-1986 in order of total dollars paid.

Q Did you review that document, Mr. Manak?

A Yes, I did.

(Information in re: PA Medicaid cases ranked by number of Medicaid cases was introduced as Defendants Exhibit 83.)

[189]

BY MS. KREBS:

Q I am handing you, Mr. Manak, Defendants Exhibit 83. Would you identify it, please?

A Defendants Exhibit 83 is similar to Exhibit 82 with the exception that it is in order of number of cases -- number of Pennsylvania Medicaid cases seen by out-of-state hospitals.

[189 (cont'd)]

Q Did you review Defendants Exhibit 83 in preparing for the work that you have done in this assignment and for the testimony that you are about to give?

A Yes, I did.

(Information in re: out-of-state Medicaid expenditures ranked by amounts paid for 1986-1987 was introduced as Defendants Exhibit 84.)

BY MS. KREBS:

Q I am handing you, Mr. Manak, Defendants Exhibit 84. Could you tell us what it is, please?

A This exhibit is again similar data, out-of-state Medicaid expenditures paid to out-of-state -- Pennsylvania Medicaid expenditures paid to out-of-state hospitals for fiscal year 1986-1987 ranked in order of total dollars paid.

Q Did you review Defendants Exhibit 84 in the course of your work here and as a basis for the testimony you may give?

A Yes, I did.

(1986-1987 Medicaid expenditures ranked by number of cases was introduced as Defendants Exhibit 85.)

[190]

BY MS. KREBS:

[190 (cont'd)]

Q I am handing you Defendants Exhibit 85, Mr. Manak. What is it?

A Defendants Exhibit 85 is similar to -- is for fiscal year 1986-87 Pennsylvania Medicaid expenditures paid to out-of-state hospitals in rank order by number of cases seen by those hospitals.

Q Did you review this document in preparation -- in your preparation for this case and as a basis for your testimony?

A Yes, I did.

(Information in re: expenditures 1984-1985 in-state hospitals was introduced as Defendants Exhibit 86.)

BY MS. KREBS:

Q I am handing you Defendants Exhibit 86. Could you identify it, please?

A Defendants Exhibit 86 is information regarding Pennsylvania Medicaid expenditures for fiscal year 1984-85 to in-state hospitals providing information regarding total dollars paid, total days, total charges, the average payment, case mix index of the patients seen, average length of stay and number of cases.

Q Did you review this document, Mr. Manak, for your work here and for whatever testimony you may give here?

A Yes, I did.

[191]

(Information in re: expenditures for 1984-1985 in order of number of cases seen by the hospital was introduced as Defendants Exhibit 87.)

BY MS. KREBS:

Q I am handing you Defendants Exhibit 87. What is that, Mr. Manak?

A This exhibit is similar to Exhibit 86 again for fiscal year '84-'85 payments to in-state hospitals by Pennsylvania Medicaid in order of number of cases seen by those hospitals.

Q Did you review this document, sir, for your assignment and for the testimony you may give?

A Yes, I did.

(Medicaid expenses paid to hospitals in other States for the years 1984 through 1987 were introduced as Defendants Exhibit 93.)

BY MS. KREBS:

Q I am handing to you, Mr. Manak, Defendants Exhibit 93. What is that, sir?

A This exhibit is Medicaid expenditures paid to hospitals in other states by the Pennsylvania Medicaid system for inpatient cases. And it is an aggregate the dollars paid to hospitals in other States by State the number of hospitals in that State and the number of cases that were

[191 (cont'd)]

seen by those hospitals. The first page is for fiscal year '84-'85. The second page is for fiscal year '85-'86. The third page is [192] fiscal year '86-'87.

Q Did you review the Defendants Exhibit 93 as part of your assignment, and is it a basis for the testimony that you may give later?

A Yes, it is.

MS. BARTELS: I think there is a confusion. We have that document I believe as 93.

MS. KREBS: I thought I had said 93.

THE COURT: I have 93.

MS. BARTELS: I thought you just said 90 a moment ago. I wanted to clarify it was 93.

BY MS. KREBS:

Q I ask you Mr. Manak, if you had reviewed this document?

A Yes.

(Listing dated 7/85 of in-state hospital rates was introduced as Defendants Exhibit 95.)

BY MS. KREBS:

Q I hand you Defendants Exhibit 95. Could you identify it, please?

[192 (cont'd)]

A Defense Exhibit 95 is a listing of in-state hospitals, what group they are in, the group rate, the hospital's specific rate and blended rate, monthly capital they are paid, monthly medical education, overall cost to charge ratio, case mix index.

[193]

Q For which hospitals?

A For in-state hospitals. The heading on this is July, 1985. And I think it says hospital table information.

Q Did you review this document, sir, for your assignment, and is it a basis for the testimony that you may offer?

A Yes, it is.

(Information in re: in-state hospital rates, 1/86, was introduced as Defendants Exhibit 96.)

BY MS. KREBS:

Q Mr. Manak, this is Defendants Exhibit 96. Could you please identify it?

A This is similar information to Defendants Exhibit 95. Again in-state hospital information regarding the payment to those hospitals, and the heading is January, 1986 hospital table information.

Q Did you review this document, sir, and is it a basis for any testimony you may give later?

[193 (cont'd)]

A Yes, it is.

Q Yes to both questions?

A Yes.

(Hospital table dated 10/86 listing payments to in-state hospitals was introduced as Defendants Exhibit 98.)

BY MS. KREBS:

Q Mr. Manak, I hand you Defendants Exhibit 98. Would you identify that, sir?

[194]

A Yes. Again, this is similar information to the previous two exhibits. The heading is October, and I am assuming it says 1986 hospital information table. It is dated Wednesday, September 24, 1986.

Q What is this?

A It is a listing of information regarding what the payment would be to in-state hospitals.

Q Did you review this document, sir?

A Yes, I did.

Q Is it a basis for any testimony you may give today?

[194 (cont'd)]

A Yes, it is.

(Information in re: PA Medicaid expenditures for in-state hospitals paid 1985-86 with amounts paid was introduced as Defendants Exhibit 88.)

BY MS. KREBS:

Q I hand you Defendants Exhibit 88.

A Defendants Exhibit 88 is information regarding Pennsylvania Medicaid expenditures paid to in-state hospitals for fiscal year 1985-86 listing the name of the hospital, the total dollars paid, the total days, average payment, case mix index, average length of stay and cases in order by total dollars paid.

Q This is again in-state hospitals?

A In-state hospitals.

Q Mr. Manak, did you review this document?

[195]

A Yes, I did.

Q Is it a basis -- was it a basis for assignment and any basis for testimony you may give today?

A Yes, it is.

[195 (cont'd)]

(Information in re: PA Medicaid expenditures or in-state hospitals for 1984-1986 with number of cases was introduced as Defendants Exhibit 89.)

BY MS. KREBS:

Q Mr. Manak, this is Defendants Exhibit 89. What is this document?

A This document, the date is the same as in the previous exhibit with the rank order being by the number of cases seen by each in-state hospital.

Q Did you review this exhibit, Mr. Manak, as part of your work in this assignment, and is it a basis for any testimony you may give later today?

A Yes, it is.

Q To both questions?

A Yes.

(List of total dollars paid to in-state hospitals ranked by total dollars paid for 1986-1987 was introduced as Defendants Exhibit 90.)

BY MS. KREBS:

Q Mr. Manak, this is Defendants Exhibit 90. Could you identify it, please?

[196]

A Defendants Exhibit 90 is a listing of in-state hospitals, the total dollars paid to them, total days, total charges, average payment, case mix index, average length of stay and cases for fiscal year 1986-87 in rank order by total dollars paid.

Q Did you review this exhibit for your work in this case?

A Yes, I did.

Q Is it a basis for any testimony you may give today?

A Yes, it is.

(List of in-state hospitals ranked by cases seen for 1986-1987 was introduced as Defendants Exhibit 91).

BY MS. KREBS:

Q I hand you Defendants Exhibit 91. Please identify it.

A This exhibit is the same data that was on Defendants Exhibit 90 in rank order by number of cases seen by the individual in-state hospitals.

Q Mr. Manak, did you review this document for your work in this case?

A Yes, I did.

[196 (cont'd)]

Q Is it a basis for any testimony you may give later?

A Yes.

MS. KREBS: With the Court's permission, I would move all of the Defendants Exhibits which I have just recited into evidence together with -- the other document is already in. [197] I would also ask counsel to stipulate that what is now marked as Plaintiff Exhibit 68 are all sworn responses to the interrogatories that were propounded by Plaintiff in this case to the Commonwealth and to stipulate further that the exhibits whose numbers I have just recited are all documents that were given by the Commonwealth of Pennsylvania to West Virginia University Hospital pursuant to requests for production during the discovery process.

THE COURT: Any problem with the stipulation?

MS. BARTELS: I believe other than the fact I have not yet seen 68 and I want to just make sure it represents just the answers to the interrogatories, if that is the case, I don't have an objection to admitting that. It is not listed separately, but we understood it was on the list, and they were going to be separate items.

As far as the exhibits, we have no question about stipulating them into evidence. We did produce them as part of discovery. I would ask though that the characterization of the exhibits not stand as the final characterization as we prepared the exhibits. Any impression Mr. Manak has about some of the information may have come from the Department or he may have assumed certain information. We will have witnesses later who will identify how the documents were prepared and what the source of the documents are.

[197 (cont'd)]

THE COURT: The documents are admitted.

[198]

(Plaintiff Exhibit 68 was admitted into evidence. Defendants Exhibits 73, 74, 75, 80 through 91, 93, 95, 96 and 98 were admitted into evidence.)

THE COURT: Now we will take a recess until one-thirty.

(A recess was taken.)

AFTERNOON SESSION

[199]

MR. STOVER: Your Honor, if I may, I just wanted to advise the Court that defense counsel has graciously consented to excusing three of the facts witnesses who testified this morning. Mr. Pickett, Ms. Leopard and Ms. Douglass have been excused.

MS. BARTELS: That's correct.

MR. STOVER: We have allowed them to go back to West Virginia.

THE COURT: Fine.

MS. BARTELS: I have also had an opportunity to review Plaintiff Exhibit 68. I had initially had a reservation because I had not

[199 (cont'd)]

read it. It does represent only the interrogatory answers and attachments so the objection is stricken.

THE COURT: Thank you.

THOMAS MANAK resumes the stand.

DIRECT EXAMINATION (continued)

BY MS. KREBS:

Q Mr. Manak, just before we broke for lunch, I had given you a series of documents and asked you whether you had reviewed those in anticipation of your testimony here today, and also as part of the general work, you were asked to do for the hospital.

I would like to resume that line of questioning [200] and ask you to identify several more documents and ask whether you reviewed these documents in the course of --

THE COURT: I should have given you another ten minutes before we recessed.

MS. KREBS: With the Court's permission, I will approach the witness.

(Resume of Thomas Manak was introduced as Plaintiff Exhibit 59.)

BY MS. KREBS:

[200 (cont'd)]

Q I am handing you Plaintiff Exhibit 59. Would you identify that, please?

A This is my resume.

MS. KREBS: I would ask that the resume be admitted into evidence as the Plaintiff Exhibit 59.

MS. BARTELS: No objection.

THE COURT: It is admitted.

(Plaintiff Exhibit 59 was admitted into evidence.)

BY MS. KREBS:

Q Mr. Manak, I am also going to hand you a series of documents and ask you to identify these documents and whether you have reviewed them. These documents are again Defendants documents.

(Medicare cost report of WVUH for 1982-1983 was introduced as Defendants Exhibit 21.)

[201]

BY MS. KREBS:

Q I am handing you Defendants Exhibit 21. Would you identify that, sir?

[201 (cont'd)]

A This is a Medicare cost report for the fiscal year ending June 30, 1983.

Q For what institution?

A West Virginia University Hospital.

Q Did you review that for your work here?

A Yes, I did.

Q Is it the basis for any testimony you may give today?

A Yes, it is.

(Medicare cost report of WVUH for 1983-1984 was introduced as Defendants Exhibit 23.)

BY MS. KREBS:

Q Would you similarly identify please Defendants Exhibit 23?

A This is the West Virginia University Hospital Medicare cost report for fiscal year 1983 to 1984.

Q Did you review that, Mr. Manak, before your testimony here today and as part of the work you were to do for West Virginia University Hospital in this situation?

A Yes, I did.

[201 (cont'd)]

(Cost report of WVUH dated 12/31/84 was introduced as Defendants Exhibit 25.)

[202]

BY MS. KREBS:

Q I hand you what is marked Exhibit 25, Defendants Exhibit 25A. Please identify that?

A This is a Medicare cost report for West Virginia University Hospital for the short fiscal year, the six months ended December 31, 1984.

Q Did you review that cost report, Mr. Manak, for your work here?

A Yes, I did.

Q Is it a basis for any testimony you may offer later this afternoon?

A Yes, it is.

MS. BARTELS: Excuse me, Your Honor. To avoid any confusion, the two exhibits were renumbered, and I had given the tags to be put on those exhibits, and they obviously were not. 25A is actually 25, and 25B is 26. When I sent the tags over, I guess they didn't get put on the copies.

MS. KREBS: But the identity of the exhibit is the same. We would accept Defendants Exhibit 25.

[202 (cont'd)]

THE COURT: Wait a minute. Wait. Which one is that?

MS. KREBS: I had asked Mr. Manak to identify Defendants Exhibit 25A.

THE COURT: Which is now really 25.

MS. BARTELS: Yes.

[203]

THE COURT: We will put a new Defendants Exhibit label on that.

MS. BARTELS: All of the tags that we have on the copies they may use here have 25 on them. It is just that one copy.

THE COURT: Put 25 on. The next one would be 26 then I presume.

(WVUH Medicare cost report for fiscal year ended 12/31/84 as amended was introduced as Defendants Exhibit 26.)

BY MS. KREBS:

Q The next exhibit is Defendants Exhibit 26.

A This is the West Virginia University Hospital Medicare cost report for fiscal year ended December 31, 1984 as amended.

[203 (cont'd)]

Q Did you review that, Mr. Manak, for your assignment for West Virginia University Hospital?

A Yes, I did.

Q Is it a basis for any testimony you may give later today?

A Yes, it is.

(Medicare cost report of WVUH for 1985 was introduced as Defendants Exhibit 27.)

BY MS. KREBS:

Q Mr. Manak, this is Defendants Exhibit 27. Please identify it.

[204]

THE COURT: Mrs. Krebs, give her that so she can put the 26 on.

A This is the Medicare cost report for the hospital's fiscal year 1985 and ends December 31, 1985.

THE COURT: What is the number on that?

A 27.

THE COURT: Thank you.

BY MS. KREBS:

[204 (cont'd)]

Q Did you review that document for this assignment for West Virginia University Hospital?

A Yes.

Q Is it a basis for any information or testimony you may give today?

A Yes.

(Medicare cost report of WVUH for 1986 was introduced as Defendants Exhibit 29.)

BY MS. KREBS:

Q Mr. Manak, I hand you Defendants Exhibit 29. Please identify it.

A It is the West Virginia University Hospitals, Inc. Medicare cost report for fiscal year 1986.

Q Have you reviewed that document, sir?

A Yes, I have.

Q Is it a basis for any testimony you may give today?

A Yes, it is.

[205]

MS. KREBS: I would ask the Court to accept into evidence the Defendants Exhibits and make them part of the Court record in this case.

THE COURT: Any objection?

MS. BARTELS: No objection.

THE COURT: They are admitted.

(Defendants Exhibits 21, 23, 25, 26, 27 and 29 were admitted into evidence.)

(WVUH Medicaid cost reports for fiscal year 1983-1984 was introduced as Plaintiff Exhibit 49.)

BY MS. KREBS:

Q Mr. Manak, I also hand you Plaintiff Exhibit 49. Please identify this, sir.

A These are Pennsylvania -- these are West Virginia University Hospital, Inc. Pennsylvania Medicaid cost reports.

Q For which years?

A For the fiscal year ended June 30, 1983, the year ended June 30, 1984, the short fiscal year ended December 31, 1984, the year ended December 31, 1985, and the year ended December 31, 1986.

[205 (cont'd)]

Q Have you reviewed these documents, Mr. Manak?

A Yes.

Q Are they a basis for any testimony you may give today?

A Yes, it is.

THE COURT: Are they all one exhibit?

[206]

MS. KREBS: Yes, Your Honor, they are. And I would ask that they also be admitted into the Court's record as Plaintiff Exhibit 49.

MS. BARTELS: No objection.

THE COURT: They are admitted.

(Plaintiff Exhibit 49 was admitted into evidence.)

BY MS. KREBS:

Q Mr. Manak, in preparing your work for West Virginia University Hospital, did you have occasion to review any other materials, and if so could you tell us what they were?

A Yes, I did review other materials. I reviewed an analysis of the Pennsylvania Medicaid system provided by the Hospital Association of Pennsylvania. I reviewed an analysis that was done by Price

[206 (cont'd)]

Waterhouse of the payments to West Virginia University Hospital, Inc. I reviewed the rules and regulations related to the payment methodologies.

Q Which payment methodologies?

A Payment methodologies relating to payments to in-state hospitals by the State of Pennsylvania and to out-of-state hospitals.

Q For the Medicaid Program?

A For the Medicaid Program.

Q Did you review any other documents relating to the Commonwealth of Pennsylvania?

A Not anything right offhand. There was large volumes of [207] documents. I don't remember what else I reviewed.

Q Did you review any bulletins or anything of that nature?

A "Pennsylvania Bulletin" I reviewed as well as I looked at information that the Defendants supplied us in response to the interrogatories. I also reviewed some discovery tables and items identified during discovery.

Q Did you have any conversations with staff of the Pennsylvania Medicaid Agency?

A Yes, I did.

[207 (cont'd)]

Q Was the information you obtained from those conversations part of your general review?

A Yes, it was.

Q Did you have any conversations with staff of the Hospital Association of Pennsylvania with respect to your overall review of the Pennsylvania payment methodologies?

A Yes, I did.

Q Did you review the "Pennsylvania Bulletin" concerning changes in the Pennsylvania Medicaid payment system?

A Yes, I did.

Q Did you review the documents that were provided by Defendants in response to the hospital's request for production of documents?

A Yes, I did.

Q Have you reviewed, Mr. Manak, cost information from [208] West Virginia University Hospital itself?

A Yes, I did review cost information.

Q And do you recall specifically what cost information you reviewed?

[208 (cont'd)]

A In regards to looking at cost information, I was reviewing costs of their graduate medical education program. I reviewed costs related to their capital and operating expenses.

Q You reviewed their Medicare and Medicaid cost reports?

A Yes, I did.

Q Pennsylvania Medicaid cost reports?

A Yes.

Q Have you reviewed the hospitals financial statements?

A Yes, I have.

Q Have you reviewed any kind of feasibility study or other statistical data pertaining to the hospital?

A There was a feasibility study prepared by another consulting firm which I reviewed which was related to the bond issue for their replacement facility.

Q Have you reviewed any statistical data concerning the hospital's admissions?

A Yes, I did.

Q Have you reviewed any statistical data concerning the hospital's number of beds?

[208 (cont'd)]

A Yes.

[209]

Q Have you reviewed any statistical information concerning the interns and residents who may provide service at that hospital?

A Yes, I did.

Q Now, Mr. Manak, is the data and information that you reviewed that deals with the Pennsylvania system for reimbursing inpatient services to Medicaid patients, is that type of information the same kind of information you have reviewed with respect to payment systems in general in the course of your work?

A Yes, it is. In general, the types of financial information, the expense information, the utilization information and economic information related to payment methodologies is consistent among various different States and the Medicare Program.

Q But the information from Pennsylvania and the cost data that you received from the hospital is the kind of information and statistical data that you would normally review in the course of your professional activities?

A The data that I looked at is the type of data I review on a regular basis in my profession.

MS. KREBS: Your Honor, I would move to qualify Mr. Manak as an expert to testify as to the general application of the

[209 (cont'd)]

payment methodology in Pennsylvania for Medicaid patients to West Virginia University Hospital.

[210]

MS. BARTELS: Your Honor, we would reserve the right to cross-examine him on his qualifications at this time.

THE COURT: Do you wish to voir dire at this time? You may proceed.

CROSS EXAMINATION AS TO QUALIFICATIONS

BY MS. BARTELS:

Q Mr. Manak, in the course of your reviews or your review of all these materials that you have just described, did you have an occasion to review materials relating to any of the in-state hospitals specifically, cost reports and other information?

A The information I reviewed regarding in-state hospitals specific data was only the information provided in the various Defendants Exhibits.

Q You did not have the opportunity to review cost reports of in-state hospitals?

A I have reviewed the -- I did look at at least one cost report for a hospital in the State of Pennsylvania.

Q Do you recall which hospital that was?

[210 (cont'd)]

A No, I don't.

Q During the course of the review, did you review any cost reports prepared by any other out-of-state hospitals that participate in the Pennsylvania Medicaid Program?

A No, I did not.

[211]

Q Did you review any documents which would show the listing of claims that were paid to West Virginia or did you rely solely on the documents you already described?

THE COURT: I am sorry. May I have the question again?

BY MS. BARTELS:

Q Did you rely or review any documents which listed the claims actually paid by the Pennsylvania Medicaid Program?

A I relied on the information provided by the Defendants in their Defendant Exhibits.

Q If I were to show you an exhibit, would you be able to tell me whether or not you reviewed that in the course of your analysis?

A I think so.

MS. BARTELS: May I approach the witness, Your Honor.

[211 (cont'd)]

THE COURT: Yes.

BY MS. BARTELS:

Q Mr. Manak, I would like to show you what has been marked as Defendants Exhibit 71. Did you review that or any similar documents in your review?

A When I was reviewing the exhibits that were presented to us by the Defendants, this type of exhibit I did notice. My charge was to take a look at the overall payment methodology of the State. This is a document that shows [212] payments by patient. Which in looking at what I was charged to do in looking at the overall patient methodology and the amount that was paid, this would not have an impact on them.

Q Mr. Manak, did you also have the opportunity during your review to review any of the audits that were issued relating to the cost reports you have identified?

A Which cost reports?

Q The Medicare cost reports you have identified for 1982-1983 and '83-84 and I believe beyond.

A During discovery, I reviewed the Medicare audit adjustments for approximately three years of Medicare cost reports. I have not looked at Medicare audited cost reports.

MS. BARTELS: Your Honor, I believe we have no objection to his qualifications as an expert.

[212 (cont'd)]

THE COURT: He is so admitted.

* * *

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

TESTIMONY OF DR. GERARD ANDERSON
(May 4, 1988 Transcript)

[293] DIRECT EXAMINATION AS TO QUALIFICATIONS

BY MR. ADAMS:

Q Dr. Anderson, what is your position?

A I am an Associate Professor at Johns Hopkins University and Director for the Center for Hospital Financing Management at Johns Hopkins University.

Q Can you tell us briefly what the Johns Hopkins Center for Hospital Finance and Management?

A Johns Hopkins Center for Hospital Finance and Management is a group of academics from the Johns Hopkins University from the School of Public Health, from the Medical School and from the Hospital. And its about 50 individuals who are taking a look at the hospital and a variety of aspects related to hospital finance and hospital care.

Q Can you tell whether there are any other such centers in the United States?

A There are research centers, but I think we are the only [294] one devoted exclusively to looking at the hospital.

Q You enjoy the title of Doctor. Can you tell us what degree you have?

[294 (cont'd)]

A I have a PhD in public policy analysis from the University of Pennsylvania. It is basically a degree in economics and statistics.

Q How long have you been the Director of the Johns Hopkins Center for Hospital Finance and Management?

A A little over a year.

Q Prior to that, what position did you hold?

A I was the Associate Director of the Center.

Q How long did you hold that position?

A For four years.

Q Can you tell us a little bit more about what the Center does?

A It is primarily a research activity. So what we do is we take a look at issues that we think are of public policy interest and try to study those from a societal perspective. We will get grants either from the federal government or state governments. We will get grants from private foundations, or we would potentially get them from hospitals; although, we don't typically get them from those or private corporations. We will take a look at an issue generally from a societal perspective.

Q Are you familiar with the acronym HCFA?

[295]

A The Health Care Financing Administration.

Q Have you in your capacity or in your work with the Johns Hopkins Center performed any work for HCFA?

A We have a grant right now from the Health Care Financing Administration trying to design ways to pay health maintenance organizations, the HMO's, alternative methods for doing it other than the way the Health Care Financing Administration currently pays them.

Q Can you tell us what HCFA is in the sense of what does that agency do?

A It adm. ..sters the Medicare and Medicaid Programs for the federal government.

Q And would that agency then be the federal oversight agency for the Pennsylvania Medicaid Program?

A Yes, it would.

Q Are you familiar with the acronym ProPac?

A Yes.

Q Could you tell us what that is?

[295 (cont'd)]

A It is Prospective Payment Assessment Commission. It is an entity established by the United States Congress to take a look at the Medicare prospective payment system.

Q And do you have any involvement with that study?

A With that institution, I do. We have done a number of studies for them related to hospital capital financing.

Q This is for the United States Congress?

[296]

A Yes, it is.

Q In your work with the Johns Hopkins Center, did you ever have occasion to address problems that relate to academic medical centers?

A Yes. One of the grants that we have is a very large grant that we administer jointly with the Association of American Medical Colleges, the AAMC. And we are taking a look at issues related to the academic medical center, trying to help them develop a data base, trying to understand public policies that confront the academic medical center and try to develop policy initiatives for the academic medical center.

Q Now in your work with the Johns Hopkins Center, do you ever have occasion to review and analyze payment methodologies that may

[296 (cont'd)]

be proposed for the reimbursement of hospitals under either the Medicaid or Medicare Programs?

A Yes, I do.

Q Prior to your going to the Johns Hopkins Center for Hospital Finance and Management, what position did you hold?

A I was an economist statistician in the Office of the Secretary in the Department of Health and Human Services in Washington, D.C.

Q When you say in the Office of the Secretary, do you mean actually in his office or just simply a part of the United States Department of Health and Human Services?

A The Secretary has a number of offices within in his own [297] office, but it is basically in the building where he is. And I had an opportunity to work with him on prospective payment and a number of other issues on an ongoing business.

Q How long were you in that position?

A I was there for five years.

Q When did that work begin?

A I started in 1978 and ended in 1983.

[297 (cont'd)]

Q Are you familiar with the report that the Secretary of Health and Human Services transmitted to Congress concerning the prospective payment system for the Medicare Program?

A Yes, I am.

Q Did you have any involvement in that?

A I did.

Q Could you please tell the Court what your involvement was?

A I had an opportunity to work with the people writing the report. As I was reviewing the report -- and I had basic oversight with review within the Office of the Secretary -- I found that it was necessary to rewrite the executive summary of it which was really the part of the report that got distributed to Congress.

During the process of oversight and review of the Secretary's report, I had an opportunity to meet on a periodic basis with the Secretary to discuss the various aspects of the prospective payment system with him.

[298] I also had an opportunity to brief people in the White House with regard to the prospective payment system. So, for example, I would meet with the Chairman of the Council of Economic Advisors.

[298 (cont'd)]

Q When the Secretary of the Department of Health and Human Services required answers to whatever technical questions that he might have had about that prospective payment system, to whom would he turn?

A He could turn to a number of people. But one of the people that he would turn to was myself.

Q How frequently would you be consulting with the Secretary of the Department for Health and Human Services?

A During the period that we were developing the Medicare prospective payment system, it would generally be on a weekly or more often than that basis. And other times during my tenure there, it wouldn't have been as frequent.

Q Am I correct in assuming, Dr. Anderson, that at various points in time the Secretary would have to go to Congress to give testimony concerning the Medicare prospective payment system?

A Yes, he would.

Q Who would accompany him?

A There would generally be the Assistant Secretary for Legislation and myself and maybe one or two other people.

[298 (cont'd)]

Q Would you -- would there be a group of people from the [299] Secretary's office who would routinely be expected to brief the various members of Congress concerning the prospective payment system as it went through the Congressional process?

A More typically, we would brief the Congressional staffers as opposed to the individual members of Congress.

Yes, there was a team that was expected to do that.

Q Were you a member of that team?

A Yes, I was.

Q Did you at this point in time when this prospective payment system for the Medicare Program was being developed, did you have any occasion to work with the Council of Economic Advisors?

A Yes, I did.

Q What did you do with respect to that entity?

A I had an opportunity to brief the Chairman of the Council of Economic Advisors Mark Feldstein.

MS. BARTELS: Your honor, we would ask that there be an offer of proof as to anything further about the development of the Medicare system which is not in litigation here. We are willing to

[299 (cont'd)]

stipulate that Dr. Anderson is intimately familiar with the Medicare System.

MR. ADAMS: We are moving on from that point at this point. I will not be addressing that again. We were simply trying to establish the basis for Dr. Anderson's expertise.

BY MR. ADAMS:

[300]

Q Dr. Anderson, have you ever had an occasion to author any articles or books concerning reimbursement methodologies and just how you finance health care?

A Yes, I have.

Q Can you tell me -- can you identify the names of any recent books that you have authored?

A Two books are forthcoming from the Johns Hopkins University Press this year. One is entitled in "No Free Lunch," and it talks about the academic medical center and the services being provided by th academic medical center. The second one is entitled "Health Care Payment Reform." What it is looking at is the history both from the Medicare and the Medicaid and the private sector side of payment reform in the United States really from 1965 through 1988.

[300 (cont'd)]

Q Now in the context of articles, how many articles generally have you published so far?

A I have about forty to forty-five articles in peer review journals.

Q What do you mean by peer review journals?

A That is to differentiate from a journal like "Hospitals" or another journal which is not peer review, is not looked at by your other academics or other experts in the field.

[301]

Q So basically the articles you have just testified about are basically articles of an academic nature?

A Yes, they are.

Q And by contrast, other articles and other types of magazines would be basically what I call the throw away magazines?

A That is your term.

Q You know what I mean by that term?

A Yes, I do.

Q Dr. Anderson, in the course of your career, have you had an occasion yourself to testify in the United States Congress concerning reimbursement of hospitals and payment methodologies for hospitals?

A Yes, I have.

[301 (cont'd)]

Q Can you briefly tell the Court the numbers of occasions and the types of occasions where you have given such testimony?

A I have testified in the Senate Finance Committee, the House Ways and Means Committee, the Energy and Commerce Committee on a variety of issues related to hospital capital finance, clinical education, hospital performance under prospective payment systems. Most recently, I testified on the first of April of this year to the Ways and Means Committee on hospital performance under prospective payment systems.

[302]

Q In giving such testimony, were you invited by the committees of the Congress to give such testimony?

A Yes, I was.

MR. ADAMS: I would like to approach the witness, Your Honor.

THE COURT: Yes.

(Copy of Dr. Gerard Anderson's resume was introduced as Plaintiff Exhibit 57.)

BY MR. ADAMS:

[302 (cont'd)]

Q Dr. Anderson, I am going to be handing you what we have marked as Plaintiff Exhibit 57.

Do you recognize that document, Dr. Anderson?

A Yes, I do.

Q What is it?

A It is a copy of my resume.

Q I want to direct your attention to the second page -- excuse me -- yes, the second page of that document. I see listed about on the bottom third of that page a section entitled articles?

A Yes.

Q Is that correct?

A Yes.

Q Am I to assume that that page and the ones that follow it list the various articles that you have written thus far?

A Those are the ones which would be in peer review [303] journals.

Q I draw your attention to the sixth page of your resume. I see you have a section there entitled grants, principal investigator post 1983. Can you tell us what the significance of the items are that are listed there?

[303 (cont'd)]

A Generally to get grants, one has to go through a competitive process to obtain these grants. Again, there is peer review kinds of activities, or they are from private foundations who have decided that the quality of work that you do is worthy and that they want to give you those types of grants.

MR. ADAMS: Your Honor, we would proffer Dr. Anderson as an expert on the topics of health care finance, specifically hospital finance, specifically hospital methodologies for reimbursement and in particular reimbursement under both the Medicare and Medicaid Programs.

THE COURT: Do you wish to voir dire?

MS. BARTELS: I would ask whether that is referring specifically to the Pennsylvania Medicare Program or the nationwide Medicaid Program?

MR. ADAMS: There is only a national Medicare Program, but Medicaid he is, we believe, fully competent to comment on the Pennsylvania Medicaid Program.

MS. BARTELS: I would like to ask a few questions.

BY MS. BARTELS:

[304]

Q Dr. Anderson, are you familiar with the Pennsylvania Medicaid Program?

A I know that it exists. I have had an opportunity to review a number of documents regarding the Pennsylvania Medicaid Program.

Q Do you recall what types of documents you reviewed?

A A whole variety of documents, particularly the history of the development of the Pennsylvania Medicaid Program.

Q Have you ever read the regulations which set forth the payment methodology?

A I have reviewed them, yes.

Q Have you had an opportunity to analyze any hospital payments for specific hospitals under the Pennsylvania Medicaid Program?

A Other than looking at the general methodology, no, I have not looked at any individual hospitals.

Q Have you looked at any other statistics that would represent data concerning the Pennsylvania or out-of-state hospitals in the Pennsylvania Medicaid Program?

A For example, I had an opportunity to look at the exhibits that Mr. Manak introduced in his testimony yesterday. I had an opportunity to

[304 (cont'd)]

look at the methodologies which is included in the history of the development of the [305] Pennsylvania prospective payment system. And that includes a great deal of numbers in terms of what hospitals get paid, etcetera.

Q Did you do any analyses based on those numbers or form any opinions about that program based on those numbers?

A Yes, I did.

MS. BARTELS: We have no objection.

THE COURT: He is so admitted.

MR. ADAMS: We would also move the admission of Plaintiff Exhibit 57, Dr. Anderson's resume.

MS. BARTELS: No objection.

THE COURT: It is admitted.

(Plaintiff Exhibit 57 was admitted into evidence.)

DIRECT EXAMINATION

BY MR. ADAMS:

Q Dr. Anderson, I take it from your responses to Mrs. Bartels that you have done some preparation for your testimony today with specific respect to this litigation; is that correct?

A Yes, it is.

[305 (cont'd)]

Q Have you reviewed any of the pleadings in this case?

A Yes, I have.

Q Can you tell me what pleadings you have reviewed?

A I have reviewed the pleadings that the State -- that the hospital provided and then the State's response, [306] etcetera.

Q Have you reviewed the hospital's complaint?

A Yes, I have.

Q Have you reviewed the defendants' answer?

A Yes, I have.

Q Have you reviewed the Defendants' answers to the hospital's interrogatories?

A Yes, I have.

Q Have you reviewed any of the documents that were produced by the Defendants in the document production?

A Yes, I have.

Q Have you reviewed any of the depositions in this case

A Yes, I have.

Q Have you reviewed Dr. Vertrees' deposition?

A Yes, I have.

[306 (cont'd)]

Q Did you review Mr. Feinberg's deposition?

A Yes, I did.

Q Did you review Mr. Nyce's deposition?

A Yes, I did.

Q Did you review Mr. Radke's deposition?

A Yes, I did.

Q I believe you have already said you have reviewed the State regulations concerning the Pennsylvania prospective payment system?

A Yes, I have.

[307]

Q Have you reviewed the State Plan?

A Yes, I have.

Q Have you reviewed the Pennsylvania findings and assurances concerning the Pennsylvania Medicaid Program?

A Yes, I have.

Q Have you reviewed the various stipulated facts in this case?

A Yes, I have.

Q Have you reviewed any of the exhibits that have been prepared for this presentation in this litigation?

A Yes, I have.

[307 (cont'd)]

Q Would I be correct, Dr. Anderson, in believing or assuming that your review of these documents form a basis for whatever opinions you may have reached concerning the Pennsylvania Medicaid reimbursement methodology?

A Yes.

* * *

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

TESTIMONY OF DR. PAUL GRIMALDI
(May 4, 1988 Transcript)

[427] DIRECT EXAMINATION AS TO QUALIFICATIONS

BY MR. ADAMS:

Q Dr. Grimaldi, what is your current position?

A I am the Director of Health Economics Reimbursement Policy at Coopers and Lybrand based on the Washington, D.C. office.

Q Could you tell us what Coopers and Lybrand is, please?

A Coopers and Lybrand is a major accounting firm which has as one of its components a management consulting services [428] division of which I am employed by.

Q In what area do you enjoy your doctorate degree?

A My doctorate is in economics.

Q How long have you been with Coopers and Lybrand?

A I have been with Coopers and Lybrand approximately five years.

Q In your work with Coopers and Lybrand, what exactly do you do?

A In the present position because I have held two? In the present position, I serve as a national resources for our offices around the country primarily as either a technical advisor or as a person who will conduct or undertake parts of various studies that we will be doing.

Q What would those studies relate to?

[428 (cont'd)]

A The studies could relate to situations facing a particular State Medicaid Agency. It could relate to a study relating to a particular issue facing a hospital, or it could relate to an issue relating to a particular insurer, HMO, etcetera.

Q Would any of these issues deal with reimbursement issues or reimbursement methodology issues?

A Yes, they do.

Q Prior to coming to Coopers and Lybrand, what was your position?

A Prior to coming with Coopers and Lybrand, I was the [429] Director of Health Economics and Research for the New Jersey Hospital Association.

Q What did you do in that position?

A My primary responsibility was (a) starting in a consulting capacity to the one hundred plus hospitals in New Jersey, and (b) to serve as a hospital representative relative to the State's efforts to implement the DRG program for New Jersey.

Q Dr. Grimaldi, does New Jersey enjoy any special relationship in the history of the development of the DRG system?

[429 (cont'd)]

A Yes, it does. New Jersey is generally regarded as I guess to use the phrase "the Father of DRG's." It was the first major implementation of DRG's. And a part of what the federal government ultimately developed is very similar to what exists in New Jersey.

Q Have you had an occasion to author any books concerning developments of a DRG system?

A I have co-authored one book that relates to DRG's as it evolved in New Jersey. That was entitled "DRG's, The Practitioner's Guide." I also co-authored I think it was two books relating to Medicare's implementation of the DRG Program.

[430]

Q Are those books referred to by practitioners around the country as source authorities?

A I would like to think so. I know the first one certainly has been. I have seen the other one quoted in various places so I would say yes.

Q How long were you with the New Jersey Hospital Association?

A Approximately four and a half years.

Q Did you have any role to play -- did you ever have any position with the New- Jersey Medicaid Program?

A Yes, I did.

[430 (cont'd)]

Q What was that position?

A I was the Chief of the Bureau of Health Statistics and Economics during the early 1970's.

Q What did you do in that position?

A I was directly responsible for the operation of the unit which contained at its high point I think eleven people. We were responsible for Medicaid -- preparing a Medicaid budget as it relates to service delivery, analyzing federal and State legislation as it related to the Program and conducting special studies at the direction of the people I reported to.

Q Did you ever enjoy any position with Seton Hall University?

A Yes. Over a span of approximately twelve years, I was on the faculty -- sometimes part-time, sometimes fulltime, depending on the circumstances.

[431]

Q During that tenure with the University, did you ever have an occasion to provide health consulting and health financing consulting services to clients?

A Yes, I did. I provided services to county governments, private industry, etcetera.

[431 (cont'd)]

Q Can you give us an approximation of the number of books and articles that you have written on the topics of health care finance?

A I would say six books --- well, five books if you say health care. Five books and approximately three dozen articles.

(Resume of Paul Grimaldi was introduced as Plaintiff Exhibit 58.)

BY MR. ADAMS:

Q I am going to show you now what we have marked as Plaintiff Exhibit 58.

MS. BARTELS: We are willing to stipulate that is his resume and that he wrote those articles if that will help things.

MR. ADAMS: Your Honor, if that is the case, we would offer Dr. Grimaldi as an expert in health care finance and health care reimbursement particularly as it relates to hospitals.

MS. BARTELS: The problem we have, Your Honor, is most of those articles relate to nursing homes.

[432]

A That is not correct. A portion of them do. Most of them do not.

THE COURT: In spite of that, he has made a proffer. Will you stipulate?

[432 (cont'd)]

MS. BARTELS: I will stipulate as far as health and hospital finance in general as long as he is not testifying specifically for Pennsylvania at this point.

MR. ADAMS: He most certainly will, Your Honor. Your Honor, I notice we have a number of people in the courtroom.

THE COURT: If there are any fact witnesses in the courtroom, please remain out in the hallway -- by either side.

MR. ADAMS: I can take him through an examination.

THE COURT: She is apparently not going to stipulate so let's go.

BY MR. ADAMS:

Q Dr. Grimaldi, have you had an occasion to review the Plaintiff's complaint in this case?

A Yes, I have

Q Have you had an occasion to review the Defendants' answer in this case?

A Yes, I have.

THE COURT: Are you getting into the substance of his testimony?

[433]

MR. ADAMS: I was trying to establish what he has reviewed, and I am going to take him back through the exhibits that I took Dr. Anderson through. And I think if I do that, I can then proffer him.

THE COURT: All right.

BY MR. ADAMS:

Q Have you had an occasion to review the Defendants' answers to the hospital's interrogatories in this case?

A Yes, I have both sets.

Q Have you had an occasion to review the various documents that were produced by the Defendants during the document production?

A Yes, I have.

Q Have you had an occasion to review the depositions of Dr. James Vertrees?

A Yes.

Q Have you had an opportunity to review the 30(b)(6) deposition of Mr. Feinberg?

A I have reviewed the deposition. I don't know if it is a 30(b)(6).

Q I will assure you it was a 30(b)(6) deposition. Have you had an occasion to review the deposition of Mr. Lloyd Nyce?

A Yes, I have.

[433 (cont'd)]

Q Have you had an opportunity to review the deposition of [434] Mr. Gerald Radke?

A Yes, I have.

Q Have you had an opportunity to review the deposition of Mr. Redmond from the Hospital Association of Pennsylvania?

A Yes, I have.

Q Have you had an opportunity to review the deposition of Mr. Ackroyd from the Hospital Association?

A Yes, I have.

Q Have you had an opportunity to review the depositions of Ms. Sheron Sturm?

A Yes.

Q And have you had an opportunity to review the deposition of Mrs. Schoen?

A Yes.

Q Have you had an opportunity to review the Pennsylvania regulations concerning the Pennsylvania Medicaid prospective payment system?

A I reviewed the proposed and final set for 1984 and what I believe are the final capital regulations published in November of '86.

[434 (cont'd)]

Q Have you had an occasion to review the findings and assurances that were submitted by Pennsylvania?

[435]

A Yes, I have.

Q Have you had an opportunity to review the stipulated facts in this case?

A Yes, I have.

Q Have you had an opportunity to review the State Plan that Pennsylvania has submitted?

A Yes, I have.

Q Have you had an opportunity -- and perhaps you want to look through the pile of exhibits on the table there -- have you had an opportunity to examine Plaintiff Exhibit 5? And please look for it; I want to make sure.

A I am sure I have.

Q Why don't we do it this way, Dr. Grimaldi, why don't you go through that stack and tell us which of the exhibits that are stacked there that you have reviewed in preparation for today?

A Do you want me to call them off as I look through them?

Q Please.

[435 (cont'd)]

A Exhibit 8, 11.

Q Could you say Plaintiff Exhibit 8?

A Plaintiff Exhibit 8, 11.

Q Plaintiff Exhibit again?

A Yes. All these will be Plaintiff Exhibits unless I say otherwise. Plaintiff Exhibits 9, 6, 13, 63, 55A, 51A, 66, 4, 5, 15, 84, 80. I am sorry; I am in trouble. Those were -- 80 and 84 are labeled Defendants Exhibits. So is 15. 81 is a Defendant. 82 is a Defendant. 84, 85, those are Defendants. 30 is Plaintiff. Of the ones I have here, that is it.

[436]

Q Do you have up there anywhere Plaintiff Exhibit 26?

A I don't see it here, no.

Q Dr. Grimaldi, we believe you may have placed it on the floor. It is a very large exhibit.

A I am sorry. Yes, I do have it.

Q Have you reviewed Plaintiff Exhibit 26?

A This is the history file?

Q Yes.

A Yes, I have.

TESTIMONY OF DR. PAUL GRIMALDI

((May 4, 1988 Transcript)

[436 (cont'd)]

MS. BARTELS: At this time, we are satisfied that he has indeed reviewed Pennsylvania materials, and so we will stipulate to his qualifications.

THE COURT: So admitted.

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UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

TESTIMONY OF DR. MICHAEL MAHER
(May 4, 1988 Transcript)

[632]

DIRECT EXAMINATION AS TO QUALIFICATIONS

BY MR. ADAMS:

Q Mr. Maher, can you tell us what position you currently hold?

[633]

A I am a partner with the firm of Coopers and Lybrand in their Philadelphia office.

Q What do you do with that office of Coopers and Lybrand?

A I run the Health Care Services Department which is a regulatory reimbursement consulting organization.

Q Prior to your coming to Coopers and Lybrand, what did you do?

A I was employed with the United States Health Care Financing Administration.

Q Is that not the agency that deals with Medicaid and Medicare Programs?

A Yes, that is the agency that has overall federal responsibility for both the Medicare and Medicaid Programs.

Q How long were you with the Health Care Financing Administration?

[633 (cont'd)]

A I was with it since its inception in 1979, and prior to that with the preceding organization since 1973.

Q Could you tell us what your duties and responsibilities were when you were with the Health Care Financing Administration?

A Yes. My responsibilities were to develop the regulations, manuals, cost reports or other issuances that governed reimbursement issues dealing with the Medicare Program as well as reviewing State Plans for approval for their Medicaid Programs.

[634]

Q Did you have any role in the designing of any of the cost reports that were used by the Medicare Program?

A Yes. The cost report was also a responsibility of the office that I headed up.

Q Did you have any involvement with the development of any of the reimbursement regulations for either the Medicare or the Medicaid Programs?

A Yes. All of the reimbursement regulations were my responsibility for revisions, development.

[634 (cont'd)]

Q While you were with the federal government, Mr. Maher, did you have an occasion ever to brief the Secretary to the United State Department of Health and Human Services?

A Yes.

Q What would you brief him about generally speaking?

A If there were controversial matters that required his attention, I would be involved sometimes by myself and sometimes with others in articulating and briefing him on those subjects.

Q Did you ever have an occasion to work with the Congress?

A Yes.

Q What would that work involve?

A That ranged from testimony before hearings of the Congress or working on a technical -- in a technical capacity with the professional staff members of the Congress or [635] Congressional committees.

Q Would that involve the matters concerning the area of hospital reimbursement?

A Yes.

Q You stated I believe earlier that you had some responsibility for the review of State Plans in the Medicaid Program; is that correct?

A That's correct.

[635 (cont'd)]

Q What exactly would you do in that process when you reviewed a State Plan?

A Prior to the prospective payment legislation which was passed in 1983, that required an in-depth review of various amendments to State Plans so that the State could ensure that the federal government would pay its share of the Medicaid Program expenditures in the State. After the 1983 legislation, that was changed so that the federal government simply had to review the assurances of the State governments that it met certain requirements of the law.

Q And in the review of those plans and those assurances after 1983, did the federal government go behind those assurances to separately evaluate the findings and the basis for those findings?

A No. After 1983, basically the review was that the State assurances were acceptable.

[636]

Q You testified that you went to Coopers and Lybrand in approximately 1984; is that correct?

A Yes.

Q Do you know what signature authority means, Mr. Maher? Is that a term you are familiar with?

[636 (cont'd)]

A Yes.

Q Can you tell us what that term means to your understanding?

A That means that I can sign the name Coopers and Lybrand on a document or on a letter, and I commit the firm of Coopers and Lybrand.

Q Do you have signature authority at Coopers and Lybrand?

A Yes, I do.

Q Is that signature authority in particular related to Medicaid and Medicare reimbursement issues?

A No. It is general signature authority, but that is the most common use that I have is for Medicare and Medicaid matters.

Q Mr. Maher, does your office -- I assume you supervise people; is that correct?

A Yes, I do.

Q Do you and the people you supervise have an occasion to advise Pennsylvania hospitals concerning Pennsylvania Medicaid reimbursement?

A Yes, we do.

[637]

Q Do you know how many hospitals that your office normally advises on those matters?

A It varies by year. Coopers and Lybrand has about 80 to 100 hospital clients in Pennsylvania.

Q What role do you play personally with respect to those 80 to 100 hospitals?

A Sometimes, I am involved in direct consulting for those hospitals. Probably up to forty of those I have been involved in personally. And other times, it is reviewing work that has been done by people who report to me.

Q Have you had an occasion in your work with Coopers to review the Pennsylvania Medicaid regulations governing the reimbursement of hospitals?

A Yes.

Q Have you had an occasion to either review or help to prepare Pennsylvania Medicaid cost reports?

A Yes.

Q Have you had an occasion to review specifically the Pennsylvania Medicaid regulation concerning the reimbursement or direct medical cost?

[637 (cont'd)]

A Yes.

Q Have you also had an occasion to review the federal Medicare regulations that concern the reimbursement of direct medical education costs?

A Yes, I have.

[638]

Q Do you and your staff become involved in audits of Pennsylvania Medicaid cost reports?

A Yes. As part of the audit, some of our hospitals we would either review or help the hospital prepare the Medicaid cost report.

Q Could you just briefly tell us what a cost report is?

A Yes. A cost report is a form designed by various payers, in this case Medicaid, to determine according to certain definitions how that hospital's costs will be reported in total and then what share that cost would be attributable to a particular payer. It basically sets out to the hospital you determine your costs using the following definitions, and then you break that down by payer, for example Medicaid, using certain formulas. Basically it is the document upon which most federal and state reimbursement flows.

[638 (cont'd)]

Q Would you have an occasion to give a hospital advice as to how to break that cost data down so it can be put on to the cost report?

A Yes.

MR. ADAMS: Your Honor, we would offer Mr. Maher as an expert not only in Medicare reimbursement, but also in Medicaid reimbursement, particularly Pennsylvania Medicaid reimbursement and also in the proper preparation of Pennsylvania Medicaid cost reports.

[639]

THE COURT: Do you wish to voir dire?

MS. BARTELS: Your Honor, I would like to. I am not sure exactly what relevance Medicare has in rebuttal of Mr. Feinberg's testimony.

MR. ADAMS: The only reason we bring up Medicare, Your Honor, is if you will recall Mr. Feinberg admitted that the State regulations on reimbursement of direct medical education costs incorporates the federal Medicare principles of direct medical education reimbursement.

MS. BARTELS: Your Honor, I believe there is a difference between Medicare principles and the payment under Medicare part B

[639 (cont'd)]

for physicians. I am not sure exactly what he is being proffered for. Before I respond, I want to know is he going to testify about both of those subject areas?

MR. ADAMS: He is going to testify that Mr. Feinberg is wrong.

THE COURT: With regard to?

MR. ADAMS: With regard to the fact that residents from approved training programs are not given separate provider contracts and do not bill for the services that they actually render to patients within a university hospital as separate providers; that instead, those costs of care are hospital costs, not physician's services costs; and that [640] under both the principles of the Medicare Program and the Pennsylvania Medicaid Program, they are reimbursed through the hospital.

MS BARTELS: Your Honor, I believe that Mr. Feinberg testified that either the resident or the attending physician was paid a payment. If they are going to proffer Mr. Maher to testify that the attending physicians have not billed, I don't know that that has been established.

THE COURT: Do you wish to voir dire on his qualifications?

[640 (cont'd)]

MR. BARTELS: Yes.

CROSS EXAMINATION AS TO QUALIFICATIONS

BY MS. BARTELS:

Q Mr. Maher, you indicated that you left HCFA in approximately 1984?

A Yes.

Q Do you recall when that was?

A March 1st, 1984.

Q During your time at HCFA, did you have the occasion to review the State Plan Amendment for the Pennsylvania prospective payment system?

A No.

Q You indicated that you review audits with your clients. Have you had occasion to review any audits of direct medical education since the prospective payment system in [641] Pennsylvania?

A I have had occasion to review audits of cost reports since that time, and those include direct medical education, yes.

Q Have you had an occasion to review any cost reports for periods beginning on July 1st of 1984 or later?

[641 (cont'd)]

A Yes.

Q Which periods would that be for?

A We reviewed through the year ending June 30th, 1987.

Q That is an audit report issued by the Department of the Auditor General, or is that a cost report?

A Our involvement is when the hospital has its financial audit done, part of that financial audit is to review the cost report because that is a very significant share of revenues for the hospital.

Q Have you had the opportunity to review any audit reports issued by the Department of the Auditor General for Medicaid in Pennsylvania for periods beginning on or after July 1st of 1984?

A No.

Q Are you aware then of --

A I am sorry. Audit reports meaning?

Q Actual certified costs and audit reports.

A Are you saying cost reports?

Q No, audit reports.

[642]

A No, I have not.

[642 (cont'd)]

Q Are you aware of any policy statements issued by the Department of the Auditor General or the Department of Public Welfare concerning the method for reimbursing direct medical education since the implementation of the prospective payment system?

A Yes.

Q What is your understanding of those policy statements?

A As was stated earlier, the policy is basically a pass-through separate payment from the prospective payment of the DRG rate. And since 1986 I believe, there has been a cap on how much could be passed through worked according to a formula.

Q What cost do you determine when you say direct medical education expenses?

A Direct medical education expenses involve the expenses of running an approved education program at the hospital and those cases involving graduate medical education for physicians. That would principally be the salaries of the interns and residents. There might be some training incidentals, but basically the bulk of that is the cost of the salary paid to an intern and resident.

[642 (cont'd)]

Q Have you had occasion to review provider agreements for physicians that work with the hospital clients you have?

[643]

A Yes.

Q Do you have any physician clients as well?

A We have physician clients, yes.

Q Do you know if any of them are teaching physicians, they teach resident in approved programs?

A Yes.

Q Do you have any knowledge as to how they bill for services or whether they bill for services provided during training sessions?

A Yes.

Q Do they bill for those services?

A Teaching physicians?

Q Yes.

A A physician generally will bill -- a teaching physician or an attending physician will bill for the services that he or she renders.

MS. BARTELS: We are satisfied that he has a background in the Pennsylvania system, Your Honor.

THE COURT: He is so admitted.

[643 (cont'd)]

MR. ADAMS: Thank you, Your Honor.

* * *

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

PLAINTIFF'S EXHIBIT 57

GERARD F. ANDERSON

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EDUCATION

University of Pennsylvania

Ph.D. in Public Policy Analysis, May 1978.
Dissertation: "A Longitudinal Investigation of Health"

Honors: University Fellow
Fellow of the Fels Center of Government
National Health Care Management Fellow

Haverford College

B.A. in Economics, May 1973.

Honors: Magna Cum Laude
High Honors in Economics
Phi Beta Kappa

ACADEMIC APPOINTMENTS

Director
The Center for Hospital Finance1987 - Present
and Management
Johns Hopkins University

Associate Director
The Center for Hospital Finance1983 - 1987
and Management
Johns Hopkins University

Associate Professor
Department of Health Policy1983 - Present
and Management
Johns Hopkins University

Co-Director
The Program for Medical1986-Present
Technology
and Practice Assessment
Johns Hopkins Medical Institutions

Adjunct Professor
Graduate School of Public1986 - Present
Administration
American University

PROFESSIONAL APPOINTMENTS

Economist
Office of Secretary1978 - 1983
U.S. Department of Health
and Human Services

Consultant1978
Blue Cross of Greater Philadelphia

Principal Investigator1974 - 1978
Philadelphia Health Management
Corporation

Research Analyst1973 - 1974
Federal Reserve Bank

Special Assistant
Cost of Living Council1972
Executive Office of the President

BOOKS

Davis K, Anderson GF, Rowland D, and Steinberg EP: Health Care Cost Containment: Lessons from the Past and a Policy Proposal for the Future, Johns Hopkins University Press, forthcoming.

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CONGRESSIONAL

1983	House Aging Committee - Prospective Payment System
1984	Senate Committee on Finance - Graduate Medical Education
1985	House Energy and Commerce Committee - Merging Manpower Planning and Hospital Financing
1986	Senate Committee on Finance - Quality of Care
1987	House Energy and Commerce Committee - Technology Assessment
1988	Ways and Means Committee - Hospital Performance

JOURNAL ACTIVITIES

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Health Affairs

Health Care Financing Review

Inquiry (Editorial Board)

Journal of the American Medical Association

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Journal of Medical Education

Medical Care

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GRANTS - PRINCIPAL INVESTIGATOR, POST 1983

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Department of Health and mental Hygiene, State of Maryland, - A Small Area Variations in Health Care Costs and Utilization

Bureau of Health Professions, DHHS - Health Professions Education

Department of Health and Human Services/Project HOPE - Implications of Physician Surplus

American Society for Parenteral and Enteral Nutrition - Implications of Prospective Payment

Department of Defense/ICF - Evaluation of the Military Health Services System

Prospective Payment Assessment Commission - Capital Payments

Commonwealth Fund - Academic Medical Centers

Bureau of Health Professions, DHHS - Education and Investor-Owned Hospitals

Bureau of Health Profession, DHHS - Health Professions Education

Prospective Payment Assessment Commission - Lagged Structures in Hospital Financing

Commonwealth Fund/Lewin and Associates - Policy Analysis for Academic Health Centers

Commonwealth Fund - Hospital Services

Commonwealth Fund/Association for American Medical Colleges - Typology of Teaching Hospitals

Retirement Research Foundation - Post Discharge Outcomes

Prospective Payment Assessment Commission/Lewin Associates - Quality of Care under PPS

Hartford Foundation - Cost Containment

American Association of Retired Persons - Policy Analysis in Long Term Care Issues

Health Care financing Administration - Adjusted Payment Rates Under Capitated Systems

April 1988

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

PLAINTIFF'S EXHIBIT 58

PAUL L. GRIMALDI, Ph.D.

COOPERS & LYBRAND
1800 M Street, N.W., Suite 400
Washington, D.C. 20036

EXPERIENCE

Director, Health Reimbursement Policy, Coopers & Lybrand, Washington, D.C. 1985 - Present. Responsible for directing economic and reimbursement studies for the Washington, D.C. health care practice and serves as a national resource for other Firm offices. Specific engagements include:

- Analysis (in-progress) of Michigan Medicaid's DRG program.
- Evaluation of the DRG program of Blue Cross and Blue Shield of Kansas City.
- Design and analysis of certain components of West Virginia's all payer hospital payment system.
- Evaluation of cost containment programs administered by Blue Cross and Blue Shield of Michigan.
- Analysis of key policy issues and structural features of Connecticut's all-payer prospective payment system.
- Development of alternative prospective payment systems for rehabilitation hospitals.
- Examination of a multi-health organization's feasibility study for SNF care and congregate care.

- Evaluation of a voluntary hospital's preliminary analysis of the feasibility of a lifecare community.
- Development of procedures for a SNF to comply with Medicare and Medicaid's new long term care survey (Part B or PaCS).
- Analysis (in progress) of Ohio Medicaid payment rates for HMO enrollees.
- Analysis (in-progress) of Oregon Medicaid payment rates for HMO enrollees.
- Examination of a reasonable cost vs. at-risk contract for HMO Medicare enrollees.

Director, National Health Care Practice, Coopers & Lybrand, New York, NY 1983-1985. Helped hospitals develop strategies for the billing/finance, data processing, utilization review, and other department to function effectively under Medicare's prospective payment system. Conducted numerous seminars nationally addressing DRGs, case-mix reimbursement, and evolving hospital marketplaces. Prepared marketing literature for the Firm's acute care and long term care services.

Director, Health Economics Research Services, New Jersey Hospital Association, Princeton, NJ, 1978-1983. Analyzed and monitored the NJ Health Department's construction of a DRG prospective payment system for inpatient hospital care. Assisted in the design of the NJ hospital market basket and a hospital case-mix information system. Provided technical assistance to hospitals in reimbursement matters.

Health Consultant, Department of Health and Social Services, Hudson County, NJ, 1976-1978. Examined the cost and utilization of various

health services and welfare programs. Engaged in planning activities for two long term care facilities. Prepared cost reports and certificates of need.

Health Economist, Hudson County Meadowview Hospital, Secaucus, NJ, 1975-1976. Identified and implemented changes leading to Medicare and Medicaid certification of distinct parts of a 724-bed long term care facility. Prepared policy and procedure manuals. Coordinated budgeting activities.

Chief, Bureau of Health Statistics and Economics, New Jersey Division of Medical Assistance and Health Services, Trenton, NJ, 1972-1974. Supervised 11 persons. Analyzed legislative changes affecting Medicaid. Helped develop an information system that monitored Medicaid payments, utilization, and provider participation. Prepared Form 2082 and sections of a $400 million Medicaid budget.

Professor of Economics, Seton Hall University, South Orange, NJ, 1971-1983. Taught (full-time or part-time) health economics, microtheory, econometrics, and other courses.

Adjunct Instructor, Fordham University, Bronx, NY, 1968-1971. Taught statistics and microtheory.

EDUCATION

PhD, Economics, Fordham University, 1974.
MA, Economics, Fordham University, 1967.
BBA, Accounting, Manhattan College, 1965.

PLAINTIFF'S EXHIBIT 58
(Cont'd)

AREAS OF SPECIALIZATION

Health Economics
Regulatory Economics
Mircoecomonics
Econometrics

SELECTED PUBLICATIONS

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"DRGs and Nursing Administration," Nursing Management, vol. 13 (January 1982), pp. 30-34.

"The Burden of Health Expenditures on the Elderly," in Socioeconomic Issues of Health 1981, R. Musacchio and D. Hough eds. (Chicago, IL: American Medical Association, 1981), pp. 77-91.

"The Role of Profit in a Reimbursement Plan," American Health Care Association Journal, vol. 7 (July 1981), pp. 2-8.

"Medicaid Reimbursement of Long-Term Nursing Care," Geriatric Nursing: American Journal of Care for the Aging, vol. 2, (March/April 1981), pp. 133-138 (Coauthor).

"Inflation Factors and Nursing Home Reimbursement," Long Term Care and Health Services Administration Quarterly, vol. (Spring 1980), pp. 16-28.

"Equity and Efficiency Implication of Case-Mix Reimbursement in New Jersey," Profile of Medical Practice, 1980, G. Glendon and R. Shapiro, eds. (Chicago, IL: American Medical Association, 1980), pp. 91-105.

"The Costs of Adult Day Care and Nursing Home Care: A Dissenting View," Inquiry, vol. 16 (Summer 1979), pp. 162-165.

"A Note on the Nursing Home Industry," Journal of Economic Issues, vol. 12 (December 1978), pp. 911-921.

"Prospective Reimbursement Rates for Hospitals: Rejoiner," Quarterly Review of Economics and Business, vol. 18 (Winter 1978), pp.94-97.

"An Analysis of the Causes of Increases in Medicaid Payments, New Jersey, 1970-74," Public Health Reports, vol. 90 (November - December 1975), pp. 509-515.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 86-0955
ROBERT CASEY, et al.,	:	
Defendants.	:	

JOINT FEE PROPOSAL

Plaintiff, West Virginia University Hospitals, Inc. (hereinafter referred to as "WVUH"), and the defendants, Robert Casey, et al., ask the Court to determine that $500,000.00 is the amount of appropriate attorneys' fees and costs that may be awarded WVUH pursuant to 42 U.S.C. § 1988. The total amount sought is attributable to $350,000.00 in attorneys' fees, $104,133.00 in expert witness fees and costs, and $45,867.00 in disbursements. In support of this fee proposal, the plaintiff and defendants state the following:

1. On July 26, 1986, WVUH commenced this action against the Governor of the Commonwealth of Pennsylvania and various other defendants pursuant to 42 U.S.C. § 1983.

2. WVUH alleged that Pennsylvania's medicaid prospective payment system as it applied to WVUH violated federal law; that Pennsylvania's medicaid administrative appeals system as it applied to WVUH violated federal law; and that WVUH's Fourteenth Amendment equal protection rights had been violated as a result of its treatment under Pennsylvania's medicaid prospective payment system.

3. WVUH sought injunctive and declaratory relief as well as reasonable attorneys' fees and costs.

4. This action was tried before the United States District Court for the Middle District of Pennsylvania on May 2, 3, 4, 5, 6 and 16, 1988.

5. This action involved complex issues of state and federal medicaid reimbursement law, detailed analysis of pertinent medicare reimbursement principles, and statutory and constitutional challenges to Pennsylvania's administrative appeals system.

6. The case dealt with certain issues that had not been litigated previously. For example, the case raised the issue of whether state medicaid reimbursement systems may properly disregard a hospital's share of low income patients who reside out-of-state when making an adjustment for hospitals serving a disproportionate share of low income persons. The case also dealt with the authority of an administrative officer under Pennsylvania law to waive or grant exceptions to properly promulgated regulations. This letter issue may have a significant effect upon Pennsylvania's system of administrative law.

7. On November 30, 1988, the District Court entered an order ruling in favor of WVUH on all significant issues and granting WVUH substantially all prospective injunctive and declaratory relief requested.

8. In its November 30, 1988 Order, the District Court granted WVUH's request for attorneys' fees pursuant to 42 U.S.C. § 1988.

9. The District Court ordered counsel for the parties to attempt to reach an agreement on the amount of WVUH's attorneys' fees.

10. The parties have reached an agreement on the amount of WVUH's attorneys' fees.

11. In connection with this action, the following attorneys worked the following numbers of hours at the following hourly rates.

Robert T. Adams

Year	Rates	Total Hours	Lodestar
6/86 - 7/87	$120.00	192.5	$ 23,100.00
8/87 - 7/88	$150.00	797.9	$119,665.00
8/88 - 11/88	$170.00	11.4	$ 1,941.00

Julia Krebs-Markrich

Year	Rates	Total Hours	Lodestar
6/86 - 7/87	$105.00	30.6	$ 3,213.00
8/87 - 7/88	$125.00	729.8	$91,209.00
8/88 - 11/88	$150.00	5.1	$ 699.00

Edward M. Macon

Year	Rates	Total Hours	Lodestar
9/87 - 5/88	$85.00	419.3	$35,640.50
6/88 - 8/88	$95.00	29.3	$ 2,783.50

Jack M. Stover

Year	Rates	Total Hours	Lodestar
5/86 - 12/87	$100.00	152.0	$15,200.00
12/87 - 12/88	$120.00	166.9	$20,028.00

James J. Kutz

Year	Rates	Total Hours	Lodestar
11/86 - 4/87	$ 75.00	7.0	$525.00
12/87 - 8/88	$ 90.00	4.9	$441.00
8/88 - 12/88	$115.00	3.9	$448.50

See Exhibits 1 & 2 for the legal services provided by Adams, Krebs-Markrich, Macon, Stover, and Kutz.

12. Adams, Krebs-Markrich, and Macon are with the law firm of McGuire, Woods, Battle & Boothe. Other lawyers, paralegals, and staff assisted in the preparation of the case. The identity of these individuals and the cost of their services are set forth in Exhibit 1.

13. Stover and Kutz are with the law firm of Shearer, Mette, Evans & Woodside. Other lawyers, paralegals, and staff assisted in the preparation of the case. The identity of these individuals and the cost of their services are set forth in Exhibit 2.

14. WVUH incurred in excess of $350,000.00 in attorneys' fees as identified in paragraphs 11, 12 and 13. After good faith negotiations, however, the parties agree that WVUH should be awarded $350,000.00 in attorneys' fees for the services of McGuire, Woods, Battle & Boothe and Shearer, Mette, Evans & Woodside. The parties further agree that $350,000.00 is a fair and reasonable amount for the services rendered by McGuire, Woods, Battle & Boothe and Shearer, Mette, Evans & Woodside, that such services were necessary, that such services were rendered in a reasonable number of hours, that the hourly rates charged by McGuire, Woods, Battle & Boothe and Shearer, Mette, Evans and Woodside were reasonable, and that WVUH actually incurred such attorneys' fees.

15. In connection with this action, the law firm of McGuire, Woods, Battle & Boothe incurred $36,293.24 in disbursements. See Exhibit 1 for a detailed explanation of disbursements incurred.

16. In connection with this action, the law firm of Shearer, Mette, Evans & Woodside incurred $9,574.38 in disbursements. See Exhibit 2 for detailed explanation of the disbursements incurred.

17. WVUH incurred $45,867.62 in disbursements as reflected in paragraphs 15 and 16 above. After good faith negotiations, however, the parties agree that WVUH should be awarded $45,867.00 for disbursements listed in paragraphs 15 and 16, above. The parties further agree that $45,867.00 is a fair and reasonable amount for such disbursements, that such disbursements were necessary, and that WVUH actually incurred such costs.

18. In connection with this action, the accounting firm of Coopers & Lybrand was hired to analyze the Pennsylvania medicaid prospective payment system, to run WVUH's statistical profile through the grouping system used by Pennsylvania to classify hospitals for medicaid reimbursement purposes, to analyze pertinent cost reports, to prepare exhibits for trial, and to testify at trial. Coopers & Lybrand's fees totalled $158,858.29. See Exhibit 3 for description of services rendered.

19. In connection with this action, Gerard F. Anderson, Ph.D., Director of Johns Hopkins University Center for Hospital Finance and Management, was hired to analyze the defendants' medicaid reimbursement system, and testify at trial as an expert witness on prospective payment systems generally and the Pennsylvania medicaid prospective payment system in particular. Dr. Anderson's fees totalled $16,217.76. See Exhibit 4 for description of services rendered.

20. WVUH incurred expert witness fees and costs in excess of $104,133.00. After good faith negotiations, however, the parties agree that WVUH should be awarded $104,133.00 in costs associated with

the services provided by Coopers & Lybrand and Dr. Anderson. The parties further agree that $104,133.00 is a fair and reasonable amount for the services rendered by Coopers & Lybrand and Dr. Anderson, that such services were necessary, and that WVUH actually incurred such costs. However, defendants to not agree that WVUH is entitled to reimbursement of expert witness fees and costs as a matter of law and defendants are filing with the court a memorandum in support of their position. WVUH will file a response to defendants' memorandum as promptly as possible, in no event to exceed seven days following receipt of defendants' memorandum.

21. Although the defendants agree that WVUH should be awarded $500,000.00 in fees and costs, that such fees and costs are fair, reasonable, and necessary, and that WVUH actually incurred such fees and costs, the defendants reserve the right to appeal the order awarding such fees and costs on any other ground that may be available.

THEREFORE, the plaintiff and the defendants respectfully request that the Court award WVUH appropriate attorneys' fees and costs in accordance with 42 U.S.C. § 1988, as outlined in this joint petition, as follows: $350,000.00 in attorneys' fees, $45,867.00 in disbursements, and, if allowable as a matter of law, expert witness fees and costs in the amount of $104,133.00.

Respectfully submitted,

WEST VIRGINIA UNIVERSITY
HOSPITALS, INC.

By: /s/ Julia Krebs-Markrich

Robert T. Adams
McGuire, Woods, Battle & Boothe
One James Center
Richmond, Virginia 23219
(804) 644-4131

Julia Krebs-Markrich
McGuire, Woods, Battle & Boothe
The Army and Navy Club Building
1627 Eye Street, N.W.
Washington, D.C. 20006

Jack M. Stover
Shearer, Mette, Evans & Woodside
1801 North Front Street
Harrisburg, Pennsylvania 17102
(717) 232-6701

ROBERT CASEY, ET AL.

By: /s/ Jerome T. Foerster

Jerome T. Foerster
Deputy Attorney General
Office of the Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 783-1471

INDEX OF EXHIBITS

1. McGuire, Woods, Battle & Boothe Billing Statements
2. Shearer, Mette, Evans & Woodside Billing Statements
3. Coopers & Lybrand Billing Statements
4. Gerard F. Anderson Billing Statements
5. Affidavit of Robert T. Adams
6. Affidavit of Julia Krebs-Markrich
7. Affidavit of James J. Kutz
8. Affidavit of Gregory M. Luce

* * *

December 7, 1988

Ms. Julia Krebs
McGuire, Woods, Battle & Boothe
Army Navy Club Building
1621 Eye Street, N.W.
Washington, D.C. 20006

Dear Ms. Krebs,

As you requested, the following is a short summary identifying the work performed for West Virginia University Hospitals, Inc. associated with its lawsuit against the Commonwealth of Pennsylvania.

The bill dated September 24, 1986 for $18,000 represented 120 hours of our time. Tasks completed included:

- Discussions to develop an understanding of the case,
- Review of prior work completed by other consultants,
- Initial work for the first financial analysis of possible lost reimbursement, and
- Initial analysis of identification of hospitals similar to WVUH in Pennsylvania.

The bill dated November 19, 1986 was for $7,500 for consulting services and $4,500 for a strategy meeting. Tasks completed included:

- Development of the preliminary grouping methodology to be used to evaluate the grouping WVUH would be if it were in Pennsylvania,

- Identification of data needed to group the hospital,
- Development of data request for WVUH,
- Strategy session at your Washington, D.C. office to develop the approach to be used in this lawsuit. Included in this meeting were WVUH representatives, the attorneys, Nelson Ford, Tom Manak, Paul Grimaldi, Jim Lowe, and Jerry Anderson.

The last bill with no detail was that dated January 21, 1987. This bill was for 88 hours and $13,200. The tasks worked on included:

- Completion of approach to the grouping,
- Calculation of the variables for the grouping run to be done by HAP,
- Development of alternative variables,
- Review of variables as required by HAP,
- Review of data completed by HAP,
- Sensitivity analysis of grouping,
- Discussions with HAP regarding approval to run the grouping, methodology, data requirements, format.

The other bills have short summaries of the areas of work completed. If you need any other additional information please call me at 312-701-6043 or Nelson Ford at 202-822-4096.

Sincerely,

Thomas J. Manak, Director
Health Care Consulting Services

September 24, 1986

Mr. Steven Pickett
Vice President Finance
West Virginia University Hospitals, Inc.
Medical Center Box 6401
Morgantown, WV 29506-6401

For services rendered in connection with the litigation support of McGuire, Woods & Battle in the lawsuit against the State of Pennsylvania through August 31, 1986.

Fees	$28,000.00
Expenses	799.42
Total	$18,799.42

Sincerely,

Nelson M. Ford
Partner
Health Care Services

UNIVERSITY OF WEST VIRGINIA HOSPITAL

HOURS ANALYSIS

Nelson Ford	8	
Tom Manak	24	
Jim Low	88	
TOTAL	120	Hours

Please return this copy
with remittance to:
Coopers & Lybrand
1800 M Street, N.W.
Washington, D.C. 20036

Mr. Steven Pickett
Vice President - Finance
West Virginia University
Hospitals, Inc.
Medical Center Box 6401
Morgantown, WV 29506-6401

November 19, 1986

For Services Rendered

For services rendered in connection with the litigation support of McGuire, Woods & Battle in the lawsuit against the State of Pennsylvania through October 31, 1986.

Consulting	$ 7,500.00
Strategy Meeting	4,500.00
Expenses	757.13
TOTAL	$12,757.13

Sincerely,

Nelson M. Ford
Partner
Health Care Services

HHf:ame
PHM

Engagement 046-9413-0060

Ref. No. 18764

OFFICE FILE 1

Please return this copy
with remittance to:
Coopers & Lybrand
1800 M Street, N.W.
Washington, D.C. 20036

Mr. Steven Pickett
Vice President - Finance
West Virginia University
Hospitals, Inc.
Medical Center Box 6401
Morgantown, WV 29506-6401

January 21, 1987

For Services Rendered

For services rendered in connection with the litigation support of McGuire, Woods & Battle in the lawsuit against the State of Pennsylvania from November 1, 1986 through December 31, 1986.

Consulting Fees	$13,200.00	(88 hours @ $150/hr)
RAP Grouping Expense	3,500.00	
Misc. Expenses	757.13	
TOTAL	$17,213.79	

Sincerely,

Nelson M. Ford
Partner
Health Care Services

HHf:ame
PHM

Engagement 046-9413-0060

Ref. No. 18804

OFFICE FILE 1

University of West Virginia Hospital

Hours Analysis 11/1/86 - 12/31/86

	11/30	12/31	Total
N. Ford	4	6	10
T. Manak	17	27	44
J. Low	12	12	24
J. Letnaunchyn	6		6
R. Deluca	4	—	4
Total	43	45	88

Please return this copy
with remittance to:
Coopers & Lybrand
1800 M Street, N.W.
Washington, D.C. 20036

Mr. Steven Pickett
Vice President - Finance
West Virginia University
Hospitals, Inc.
Medical Center Box 6401
Morgantown, WV 29506-6401

July 14, 1987

For Services Rendered

In connection with litigation support of WVUH and McGuire, Woods & Battle in the lawsuit against the Medical Assistance Program of the Commonwealth of Pennsylvania from January 1, 1987 through June 30, 1987.

Consulting Fees (58 hours @ $150/hr) (see attached detail)	$ 8,700.00
Expenses	1,561.66
TOTAL	$10,261.66

Sincerely,

Nelson M. Ford
Partner
Health Care Services

HHf:ame
PHM

Engagement 046-9413-0060

Ref. No. 25478

OFFICE FILE 1

1987 Billing Detail - West Virginia University Hospital

C&L Staff	January	February	March	April	May	June	Total
Nelson Ford		3	15		1	3	22
Tom Manak		4	18			4	26
Paul Grimaldi			8			2	10
		7	41		1	9	58
Expenses							
Travel (to Morgantown x 3)				$1,312.82			
Other Misc. (xerox, postage, phone)	$115.20	$70.04			$63.60		
	$115.20	$70.04		$1,312.82	$63.60		$1,561.66

Notes: February time for workpaper preparation and engagement management.
March time for preparation for and attendance at strategy session in Morgantown.
May time for engagement management.
June time for review of discovery documents and preliminary cost report review.

1987 Billing Detail - West Virginia University Hospital

C&L Staff	July	August	September	October	November	December	Total
Nelson Ford		3	1		2	3	9
Tom Manak	2	40	2	18	35	70	167
Paul Grimaldi			2		8	5	15
Bob Deluca					3		3
	2	43	5	18	48	78	194
Expenses							
Travel		$1,630.21			$653.80	$1,169.23	$3,453.26
Meals		34.50			34.50	24.00	93.00
Other Misc.							
(Xerox, postage,phone)					75.56	101.54	117.10
		$1,664.71			$763.86	$1,294.77	$3,723.34

Notes: Nelson Ford time for review of interrogatories and engagement management.
Tom Manak time for review of discovery documents, analysis of cost report submissions, preparation for and attendance of depositions and strategy sessions in Morgantown, Harrisburg and Washington.
Paul Gramaldi time for review of interrogatories and documents and for testimony preparation session.
Bob DeLuca time for response to questions about application of Pennsylvania MA regulations.

Please return this copy
with remittance to:
Coopers & Lybrand
1800 M Street, N.W.
Washington, D.C. 20036

Mr. David Brisell
Vice President - Legal Services
West Virginia University
Hospitals, Inc.
Medical Center Box 6401
Morgantown, WV 29506

January 25,1987

For Services Rendered

In connection with litigation support of WVUH and McGuire, Woods & Battle in the lawsuit against the Medical Assistance Program of the Commonwealth of Pennsylvania from July 1, 1987 through December 31, 1987.

Consulting Fees		
194 hours at $150.00/hr.		$29,100.00
(see attached detail)		
Expenses		
Travel and subsistence	3,453.24	
Meals	93.00	
Other	177.10	
TOTAL		$32,823.24

Sincerely,

Nelson M. Ford
Partner
Health Care Services

HHf:bs

Engagement 046-9413-0060

Ref. No. 28228

OFFICE FILE 1

Mr. David Brisell
Vice President - Legal Services
West Virginia University
Hospitals, Inc.
Medical Center Box 6401
Morgantown, WV 29506

Please return this copy
with remittance to:
Coopers & Lybrand
1800 M Street, N.W.
Washington, D.C. 20036

April 22,1987

For Services Rendered

In connection with litigation support of WVUH and McGuire, Woods & Battle in the lawsuit against the Medical Assistance Program of the Commonwealth of Pennsylvania from January 1, 1988 through March 31, 1988.

Consulting Fees	
130 hours at $150.00/hr. (see attached detail)	$19,500.00
Expenses	
Travel and subsistence	1,835.75
Meals	54.50
Other	46.91
TOTAL	$21,437.16

Sincerely,

Nelson M. Ford
Partner
Health Care Services

HHf:bs

Engagement 046-9413-0060

Ref. No. 22209

OFFICE FILE 1

1988 Billing Detail - West Virginia University Hospital

C&L Staff	January	February	March	Total
Nelson Ford	3		4	7
Tom Manak	34	3	11	48
Paul Grimaldi	7	20	16	43
Mike Weaver	16	16		32
	60	39	31	130
Expenses				
Travel	$691.60	$261.93	$882.22	$1,835.75
Meals	13.50	36.50	4.50	54.50
Other Misc.	15.00	15.25	16.66	46.91
	$720.10	$313.68	$903.38	$1,937.16

Notes: Nelson Ford time for engagement management.

Tom Manak time for review of discovery documents, analysis of cost report submissions, preparation for and attendance of depositions and strategy sessions in Morgantown, Harrisburg and Washington.

Paul Grimaldi time for review of interrogatories and documents and for testimony preparation session.

Mike Weaver time for assistance in preparation of exhibits.

Mr. David Brisell
Vice President - Legal Services
West Virginia University
Hospitals, Inc.
Medical Center Box 6401
Morgantown, WV 29506

Please return this copy
with remittance to:
Coopers & Lybrand
1800 M Street, N.W.
Washington, D.C. 20036

July 15,1988

For Services Rendered

In connection with litigation support of WVUH and McGuire, Woods & Battle in the lawsuit against the Medical Assistance Program of the Commonwealth of Pennsylvania from April 1, 1988 through June 30, 1988 including preparation for and attendance at trial.

Consulting Fees	
286 hours at $150.00/hr. (see attached detail)	$42,900.00
Expenses	
Travel and subsistence	2,179.11
Meals	417.41
Other	69.37
TOTAL	$45,565.89

Sincerely,

Nelson M. Ford
Partner
Health Care Services

HHf:bs

Engagement 046-9413-0060

Ref. No. 22245

OFFICE FILE 1

1988 Billing Detail - West Virginia University Hospital

C&L Staff	April	May	June	Total
Nelson Ford	3	4	1	8
Tom Manak	50	86	2	138
Paul Grimaldi	32	57	2	91
Mike Weaver	20	7		27
Mike Maher		22		22
	105	176	5	286
Expenses				
Travel/Hotel		$2,179.11		$2,179.11
Meals		417.41		417.41
Other Misc.	$31.25	32.96	$5.16	$ 69.37
	$31.25	$2,629.48	$5.16	$2,665.89

Notes: Nelson Ford time for engagement management and work product review.

Tom Manak time for review of discovery documents, analysis of cost report submissions, preparation of exhibits and preparation and delivery of testimony at trial.

Paul Grimaldi time for preparation and delivery of testimony at trial.

Mike Weaver time for preparation and delivery of testimony at trial.

Mike Weaver time for assistance in preparation of exhibits.

THE CENTER FOR HOSPITAL FINANCE AND MANAGEMENT
THE JOHNS HOPKINS MEDICAL INSTITUTIONS
624 North Broadway Baltimore, Maryland 21205 (301) 955-2300

DATE: May 11, 1988

SUBJECT: West Virginia Case

INVOICE

MILEAGE:	458 mi../22.5 cents/mi.	$103.05
PARKING:	5/2/88	5.00
	5/3/88	7.00
	5/4/88	7.00
HOTEL:	4/30 - 5/5/88	$595.71
TOTAL:		$717.76

Please make check payable to:
Gerard F. Anderson, Ph.D.
055-38-3864

Please mail check to:
Gerard F. Anderson, Ph.D
Director
Johns Hopkins University
Center for Hospital Finance and Management
Hampton House, Room 300
624 N. Broadway
Baltimore, MD 21205

THE CENTER FOR HOSPITAL FINANCE AND MANAGEMENT
THE JOHNS HOPKINS MEDICAL INSTITUTIONS
624 North Broadway Baltimore, Maryland 21205 (301) 955-2300

INVOICE

Date: March 1, 1988

Case: West Virginia University Hospitals, Inc.
vs.
Robert P. Casey, et al

Labor Hours: Analysis of State's Depositions
4.5 hours @ $150/hour
Total: $675.00

Make Check Payable To: Gerard F. Anderson
055-38-3864

Mail Check To: Gerard F. Anderson
Center for Hospital Finance and Management
Hampton House, Room 300
624 N. Broadway
Baltimore, MD 21205

THE CENTER FOR HOSPITAL FINANCE AND MANAGEMENT
THE JOHNS HOPKINS MEDICAL INSTITUTIONS
624 North Broadway Baltimore, Maryland 21205 (301) 955-2300

DATE: May 10, 1988

SUBJECT: West Virginia Case

INVOICE

Preparation for Trial:	20 hours $150/hr	$ 3,000
Trial:	70.5 Hours	$10,575
Computer Analysis of Johns Hopkins Hospital Medicaid Patients		$ 1,250
TOTAL:		$14,825

Please make check payable to:

Gerard F. Anderson, Ph.D.
Director
Johns Hopkins University
Center for Hospital Finance and Management
Hampton House, Room 300
624 N. Broadway
Baltimore, MD 21205

• • •

Filed March 12, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-5165

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.

v.

ROBERT CASEY, Governor, Commonwealth of Pennsylvania; JOHN WHITE, Secretary, Department of Public Welfare; DAVID S. FEINBERG, Director, Office of Medical Assistance; THE DEPARTMENT OF PUBLIC WELFARE,

Appellants

Submitted December 5, 1989
Before: BECKER, STAPLETON, and ROSENN, Circuit Judges
OPINION FILED March 12, 1990

ERNEST D. PREATE, JR., Attorney General
JEROME T. FOERSTER, Deputy Attorney General
CALVIN R. KOONS, Senior Deputy Attorney
JOHN G. KNORR, III, Chief Deputy Attorney General
Chief, Litigation Section
Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
Attorneys for Appellants

ROBERT T. ADAMS, ESQ.
THOMAS J. STALLINGS, ESQ.
McGuire, Woods, Battle & Boothe
One James Center
Richmond, VA 23219

JULIA KREBS-MARKRICH, ESQ.
McGuire, Woods, Battle & Boothe
The Army & Navy Club Building
1627 Eye Street, N.W., Suite 1000
Washington, D.C. 20006

JACK M. STOVER, ESQ.
Mette, Evans & Woodside
1801 North Front Street
P. O. Box 729
Harrisburg, PA 17108-0729
Attorneys for Appellees

SUR MOTION FOR ATTORNEYS' FEES AND COSTS

ROSENN, Circuit Judge.

On July 6, 1986, West Virginia University Hospitals, Inc. (WVUH or the Hospital) commenced an action against the Governor of the Commonwealth of Pennsylvania and various other officials (the State) pursuant to 42 U.S.C. §1983. In the action WVUH sought injunctive and declaratory relief invalidating the out-of-state aspects of Pennsylvania's hospital reimbursement program, as well as reasonable attorneys' fees, including expert witness fees, and costs. WVUH claimed that Pennsylvania's medicaid prospective payment system as it applied to the plaintiff violated federal law. The litigation dealt with certain issues which had not been previously litigated and involved complex issues of state and federal medicaid reimbursement law and statutory and constitutional challenges to Pennsylvania's administrative system. On November 30, 1988, the district court entered an order in favor of the Hospital on all significant issues and awarded WVUH substantially the prospective relief requested, as well as attorneys' fees (including expert witness fees) and costs.

Subsequent to that litigation, WVUH applied to the district court for attorneys' fees and following negotiations the parties agreed on the sum of $350,000, which the court approved. The defendants filed a timely appeal with this court vigorously challenging the major aspects of the district court's decision. After oral argument and review of the briefs and record, we rendered our decision on September 5, 1989, affirming the district court's judgment that Pennsylvania's medicaid prospective system as applied to plaintiff violated federal law, but reversing the district court's declaration that Pennsylvania's administrative appeals system as it applied to WVUH violated federal law and the award of retroactive relief. We also vacated the award for expert witness fees insofar as it allowed a sum in excess of thirty dollars per day. We denied WVUH's petition for rehearing.

Based on our decision, we now have before us the Hospital's application as amended for attorneys' fees in the sum of $132,737.47 and $7,394.37 in disbursements in connection with the appeal to this court. The State opposes the application with numerous objections which, although they do not raise the request for fees and costs to the same level of complexity as the underlying litigation, nonetheless present the trappings of major litigation. We grant the motion in part.

I.

WVUH claims that it is entitled to the fees requested before this court because it prevailed on the appeal within the meaning of 42 U.S.C. §1988. It asserts that the essential question in its lawsuit and on appeal was whether Pennsylvania's medicaid prospective payment system, as it applied to WVUH, complied with federal law. It prevailed in the resolution of this issue in both the district court and on appeal in this court. WVUH acknowledges that we reversed the district court's determination declaring invalid the legality and adequacy of Pennsylvania's administrative appeals system as well as the district court's award of relief retroactive to the filing of the lawsuit. West Virginia University Hosp., Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989). We also vacated the district court's decision allowing expert witness fees of $104,103.00 under 42 U.S.C. §1988. The Hospital, however, contends that the administrative appeals issue "is subordinate to the central issue" concerning the legality and adequacy of the prospective payment system, and the expert witness fee issue is tangential to the substantive claim concerning the legality and adequacy of Pennsylvania's medicaid prospective system, and arose solely from the question of the total amount of attorneys' fees to be awarded. The Hospital maintains that it has protected its essential legal rights, "will obtain major and permanent changes in Pennsylvania's reimbursement practices," and has thus obtained the "primary relief" it sought. WVUH therefore concludes that it is the prevailing party for purposed of 42 U.S.C. § 1988 and is entitled to all of the attorneys' fees and disbursements requested on the appeal to this court and in connection

with earlier efforts to enforce compliance with the judgment of the district court.

The State, responding to the Hospital's application, has raised numerous objections. They may be summarized as follows:

(1) WVUH is not entitled to attorneys' fees in the sum requested because on appeal it lost on "three significant issues"· the administrative appeals issue, the retroactivity issue, and the expert witness fees issue. Therefore, the State contends the request for fees should be reduced by seventy-five percent.

(2) This court may not award fees on a direct motion to this court for WVUH's efforts to enforce compliance with the district court's judgment because those services were not rendered in the court of appeals. Specifically, the State challenges fees for WVUH's unsuccessful Rule 70 motion in the district court and for WVUH's efforts to enforce compliance with the district court judgment.

(3) No award should be made for items that represent an unnecessary duplication of effort by multiple counsel.

(4) No award can be made for numerous items of alleged service when the individual entries in the plaintiffs' supporting exhibits lack necessary specificity.

(5) Miscellaneous items of disbursement for telephone, duplicating, and other office expenses were either unnecessary or excessively expensive.

II.

The major issue before us pertains to the State's request for a reduction of attorney's fees under the principles enunciated in Hensley

v. Eckerhart, 461 U.S. 424 (1983), because the plaintiff, WVUH, did not prevail on all the issues raised on appeal. In Hensley, the Supreme Court held that courts must assess the claims advanced and the results achieved by the prevailing party when determining what is a "reasonable" attorney's fee under 42 U.S.C. §1988. Under Hensley, attorneys are not to be compensated for time spent on claims which are unrelated to successful claims. Id. at 435. However, "where a lawsuit consists of related claims, a plaintiff should not have his attorney's fees reduced simply..." because some related claims are unsuccessful. Id. at 440. The court must consider whether the results obtained by the prevailing party justify an award of attorney's fees for hours spent on related but unsuccessful claims. Hensley at 435. When the relief obtained is excellent, the prevailing party may recover fees for "all hours reasonably expended on the litigation." Id. at 436. If the prevailing party does not obtain substantial but only partial relief, a full award of fees for all hours spent on related, unsuccessful claims would be excessive. Hensley at 440.

There can be no doubt that the central issue on appeal, as it was in the district court, was whether Pennsylvania's formulation for reimbursing out-of-state hospitals for their inpatient services to Pennsylvania medicaid recipients violated federal statutory and regulatory law. WVUH prevailed on this issue. The plaintiff argues that the claims in this appeal are related because they emanate from a common core of facts and are base don related legal theories. It asserts that each of the claims raised on appeal cannot be reasonably viewed as "distinct in all respects" from the central issue in the case and it is, therefore, entitled to a full compensatory award. Not surprisingly, the defendants have a different perspective of the Hospital's case. They contend that the issue on which WVUH prevailed was separate and distinct from the claims it lost on appeal. Although the State concedes that all of the issues may have been intertwined at the district court level, that was not the situation before this court. Having prevailed on only one of four issues, the State concludes that the Hospital's fee award should be reduced by seventy-five percent.

Regrettably, except for conclusory statements, neither of the parties provides us with any assistance in determining whether the claims are related or are separate and distinct from the principal claim on which WVUH prevailed. One useful "starting point for separating an unrelated, unsuccessful claim from a related unsuccessful claim is to determine whether a particular unsuccessful claim shares a "common core of facts" with the successful claim or is based on a "related legal theory." Hensley, 461 U.S. at 435. The Court in Hensley also instructs us to interpret "related claims" broadly. Nonetheless, when the plaintiff has not prevailed on a claim "that is distinct in all respect from his successful claim," time spent on the unsuccessful claim "should be excluded in considering the amount of a reasonable fee." Hensley at 440. With these principles in mind, we address the claims which were advanced unsuccessfully by WVUH on appeal.

III.

A. The Administrative Appeals Issue

On appeal, WVUH lost on its claim concerning the legality of Pennsylvania's administrative appeals system and appropriately asserts that this claim is subordinate to the central issue, the legality and adequacy of the prospective payment system. The defendants assert that both parties considered the issue significant because it related to the district court's grant of retroactive relief. The immediate consideration before us, however, is not so much whether the claim is subordinate, but whether it is related to the successful claim for relief.

Whether the Pennsylvania administrative appeals issue is related to WVUH's attack on the alleged violations of Title XIX of the Federal Medicaid Act may be a close question. However, we conclude that the relationship, if any, is remote and that the issue is discrete. WVUH argues that a relationship exists between the two issues because a successful challenge to the administrative appeals system might have opened an avenue for alternative relief. We reject this argument.

We see the factual matrix to the legality of Pennsylvania's administrative appeals system as totally different from the successful challenge to the validity of Pennsylvania's hospital reimbursement program for medicaid services. Pennsylvania's reimbursement plan and its statutes and regulations setting up an administrative appeals system deal with different subjects. The first sets up a specific medical assistance and reimbursement program; the latter creates a state procedural structure applicable to the administrative appeals generally within the Commonwealth. The legal theory and analysis pertaining to each is different. The issue involve two different aspects of the administration of the Commonwealth's medicaid program, governed by different provisions of the Federal Medicaid Act. In essence, we are asked to construe two different statutes, each treating totally different subjects. We therefore reject the plaintiff's claim that it is entitled to a fee amount with respect to its unsuccessful administrative appeals issue. In our judgment, a 15 percent disallowance of the fee requested on the appeal, excluding services pertaining to the post-argument brief which were unrelated to the issue, is reasonable. In our computation, infra, for the attorneys' fees allowance on appeal, we will deduct 15 percent, excluding services pertaining to the post-argument brief.

B. The Retroactivity and Eleventh Amendment Issue

The district court awarded relief retroactive to the day WVUH commenced its lawsuit against the defendants. We reversed and instead ordered relief from the date of the court's initial judgment. The State's position is that this issue was of great significance to it and to WVUH, requiring significant time and effort from WVUH, and that the services the Hospital devoted to this issue should not be compensated. However, we will not dwell long on this issue because obviously the date the relief commences is directly related to WVUH's principal claim; the retroactivity claim had a direct effect on the claim for damages.

Given the relatedness of the retroactive claim to WVUH's successful claims, the court's "rejection" of WVUH's retroactive claim "is not a sufficient reason" for reducing its attorneys' fees. Hensley at

435. On the contrary, we are to assess the appropriateness of a fee award by "focus[ing] on the significance of the overall relief obtained by the plaintiff." Id. The Hospital's retroactive claim was related to the principal issue upon which it obtained substantial relief. Therefore, we exercise our discretion and award attorney's fees for all hours reasonably spent on the retroactive claim. See Hensley at 437. The State's contention that the plaintiff is not entitled to a fee award with respect to this issue is rejected.

C. Expert Witness Fees

Although the defendants stipulated that WVUH's experts were indispensable to their case, the plaintiff claimed and obtained in the district court an award of expert witness fees in the sum of $104,133.00. The State argued, on appeal, as they did in the district court, that the amount of expert witness fees allowed improperly exceeded the statutory maximum of thirty dollars per day under 28 U.S.C. §1821(b). We reluctantly concluded that the defendants were correct and vacated the district court's judgment awarding attorneys' fees insofar as it awarded WVUH expert witness fees in excess of thirty dollars per day.

In its application for attorneys' fees in this court, WVUH describes this issue of expert witness fees as "tangential" to its principal claim. Although WVUH concedes that this issue "is arguably unrelated to the claims presented," it asserts that it should prevail on this issue too because the issue is directly related to the overall request for reimbursement of attorneys' fees. We disagree. We believe that the matter of the sum to be awarded as expert witness fees under 42 U.S.C. §1988 is an issue separate and distinct from the primary issue on which the plaintiff prevailed and thus "unrelated" to it. Of course, the claims for expert witness fees arise out of this litigation, but this does mean that they are per se directly related to the primary legal issue on which the plaintiff prevailed.

Whether expert witnesses are limited in their claim for fees to thirty dollars per day as provided by statute or may claim fees in a section 1983 suit without regard to the statutory limitations contained in 28 U.S.C. §1821(b) is a matter not related at all to the plaintiff's legal challenge to Pennsylvania's medicaid payment system. How much is to be paid an expert witness is common to any civil suit in which expert witnesses are called, and it has no special bearing on the principal issue on which the plaintiff prevailed. The plaintiff's claim for attorneys' fees for services pertaining to this issue will therefore be rejected.

The burden of proving entitlement to reimbursement is upon the applicant. It is difficult to ascertain the precise number of hours and services performed on this issue from the exhibits attached to plaintiff's application, notwithstanding the more than 800 bookkeeping entries set forth therein. The State would have us simply make a mathematical deduction of 25 percent of the fees claimed because WVUH lost on this one of four issues. We think this is too simplistic and unrealistic. We have taken what we regard as a more pragmatic approach. We have noted that plaintiff's counsel spent a certain amount of time and effort in researching the issue in the district court in connection with the application for attorney's fees and expert witness fees in that court. This reduced the amount of time required in researching and briefing the issue in this court. The question was not complex and although the amount of witness fees requested exceeded $100,000, the issue was the most subordinate of those presented on appeal. In our judgement, a ten percent disallowance of the fee requested on the appeal, excluding services pertaining to the post-argument brief which had nothing to do with this issue, is reasonable. In our computation infra for the attorneys' fees allowance on appeal, excluding services in connection with the post-argument brief, we will deduct ten percent.

D. Services to Enforce Compliance with the District Court's Judgment

The plaintiff has also submitted to this court a request for a fee award combining a large variety of services it represents was performed in implementing the judgment of the district court, including preparation for and meeting with Pennsylvania medicaid officials, analysis of the Pennsylvania State Plan Amendment submitted to the United States Department of Health & Human Services, preparation of a brief in opposition to the application to the district court for a stay pending appeal, preparation of a Rule 70 motion and supporting brief with the district court to enforce its judgment. Although the State does not object to the hourly rate claimed for each lawyer, it challenges the number of hours claimed and expenses incurred because those services were not involved in the appeal to this court.

An appellate court is not in a position to review a dispute with respect to post-judgment legal or related services performed in the district court, or with respect to the enforcement or implementation of that court's judgment unless the district court has made the requisite findings of fact. It would be highly presumptuous and far from prudential for an appellate court acting on a motion for fees relating to an appeal before it to also adjudicate disputed issues of fact on matters not involved in the appeal, and on which the district court had no opportunity to pass judgment.

The district court entered its memorandum opinion and order on November 30, 1988. However, final judgment was not entered until January 31, 1989. Nonetheless, commencing on November 30, 1988, with an entry of $120 charge for a telephone call relating to the district court's decision, fees and costs are requested throughout the numerous entries in plaintiff's exhibits 1 and 2 for services not relating to the appeal in this court. In fact, a considerable sum is even requested for services and expenses in connection with the request for attorneys' fees in the district court and the joint stipulation ultimately reached in connection therewith. Also, attorneys' fees are requested for conferences with the Pennsylvania Department of Welfare, and expenses related thereto. We obviously have no way of assessing

whether these services and expenses were required, are reasonable, and whether they were compensated in the fee award made by the district court. For example, an item on December 12, 1988, requesting $450 in attorneys' fees for a telephone call between plaintiff's attorney, Ms. Krebs-Markrich, and other counsel appears to relate to the fee proposal in the district court.

Only the district court is in a position to know whether any of the services for which compensation is sought here were included in the stipulated fees allowed by it of $350,000. If an evidentiary hearing must be conducted as to the other items sought in enforcing the judgment, the district court should conduct it and make the necessary findings. We see no plausible basis for this court to adjudicate these disputed claims and we will not pass upon them. We have reviewed each of the cases cited by the plaintiff, namely Burke v. Guiney, 700 F.2d 767 (1st Cir. 1983); Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979); cert. denied, 447 U.S. 911 (1980); and Prandini v. National Tea Co., 585 F.2d 47 (3d Cir. 1978). None of these cases provides us with any precedent to support the award requested. Furthermore, WVUH did not prevail on its Rule 70 motion in the district court.

We are optimistic that in light of the ability and skill of counsel for the parties to agree upon a fair sum for attorneys' fees in the much larger claim for trial fees in the district court, they will reach an agreement with respect to attorneys' fees for the post-judgment services rendered without the need to invoke an evidentiary hearing in the district court.

E. Duplication of Effort by Multiple Counsel and Unnecessary Services

The State objects to $11,121.50 requested in fees by plaintiff on the ground that these services were duplicative and unnecessary. The plaintiff counters by asserting that given the complexity of the issues and the size of the record, it was not unreasonable to have the two

principal attorneys from Virginia present at the oral argument. WVUH also notes that due to our expedition of the briefing and oral argument, counsel for WVUH had less time than usual to prepare for argument, and, therefore, had divided the work on appeal. Furthermore, it asserts that local counsel were necessary because of their familiarity with practice before this court.

It seems that an extraordinary amount of time was consumed by appellee's counsel in the preparation of an appellate brief pertaining to a case which they had tried, researched, and briefed in the district court. Furthermore, the appellant's had the laboring oar in framing the issues on appeal and preparing the appendix. Nonetheless, we are unable to say that multiple counsel were unnecessary or that the hours consumed were unreasonable. We did order expedited briefing and oral argument; the issues were complex.

On a prior occasion we noted the thin line that may exist between a reasonable and unreasonable expenditure of time in pursuit of a client's cause. We also reminded counsel that members of the bar are officers of the court and that they should demonstrate the same level of billing judgment and sensitivity in fee shifting situations as they do with their own private clients.

> The courts frequently must rely not only upon the accuracy of the record keeping but upon the intellectual honesty of counsel in the allocation of hours worked and in the measurement of time. Lawyers must therefore exercise care, judgment, and ethical responsibility in the delicate task of billing time and excluding hours that are unnecessary. Such consideration may not be abandoned because fee responsibility is shifted under 42 U.S.C. §1988.

Hall v. Borough of Roselle, 747 F.2d 838, 841-42 (3d Cir. 1984). In the absence of evidence to the contrary, we choose to believe that counsel were intellectually honest with the court and their opponents and properly allocated the hours worked and the measurement of time.

With respect to the presence of multiple counsel at oral argument, we think that more than two counsel was unnecessary. In addition to Mr. Adams, who argued the appeal for WVUH, perhaps one additional lawyer may have been necessary in an appeal of this complexity at oral argument to assist and to refer to the record of briefs. We will allow fees for the two principal attorneys present at oral argument, Adams and Krebs-Markrich.

As to the presence of local counsel at oral argument, we do not believe that the rules of practice of the Third Circuit are so unique or dissimilar from the rules of the Fourth Circuit, where the principal counsel have their office, as to also require the presence of local counsel. Furthermore, Mr. Adams and his partner appropriately familiarized themselves with the rules of this court. We will allow a reasonable amount for this purpose. However, they have charged what appears to be approximately seven hours of time aggregating $1,190.00 for familiarizing themselves with our court rules in connection with filings and oral argument. We believe that seven hours for seasoned and experienced counsel to familiarize themselves with our appellate rules are grossly excessive. We will allow $300.00. Under the circumstances, we see no reasonable basis for the additional presence of local counsel at oral argument in this court. The sum of $400.00 requested in fees for local counsel at oral argument and $277.73 for his lodging and expenses will be disallowed.

The State also objects to charges by Attorneys Adams, Krebs-Markrich, and Stover relating to meetings with the Pennsylvania Department of Public Welfare in Harrisburg, Pennsylvania, on the grounds that the charges are duplicative and there was no need for more than one attorney for this purpose. We do not reach this issue because we have already rejected these items because the services were not relevant to the appeal in this court.

At oral argument, the court requested counsel for WVUH to supplement their brief with a memorandum on the standing of the Hospital to seek relief under 42 U.S.C. §1983 for violation of the

Social Security Act governing hospital reimbursement and whether the eleventh amendment barred retroactive relief from the date of filing the lawsuit. We are able to identify 138.10 hours in plaintiff's exhibit as time spent on the post-argument brief. These hours include cite checking, instant citing, reviewing, and editing. The total fee request for this time is $17,423.00. Although these charges seem high, and as many as three lawyers charged for services performed on the same day, we cannot say that these services were duplicative or unnecessary. Counsel were under time constraints to submit the brief after oral argument and it is understandable that under such circumstances more than one lawyer might be engaged at the same time in the research and drafting. Furthermore, the issues addressed were very complex, involved extensive research and the study of numerous cases. The request for fees for the post-argument briefing will be allowed.

F. Miscellaneous Items Of Disbursement
for Telephone, Duplicating and Other
Office Expenses

The State contends that the plaintiff seeks payment for courier travel to pick up and deliver documents when the United States mails should have been used. Plaintiff responds that it utilized hand delivery to give sufficient preparation time because the court ordered expedited briefs and oral argument, and to ensure compliance with mandatory deadlines. We assume that as officers of the court, counsel will not unnecessarily incur useless expense in courier services if mail services will suffice merely because costs are being shifted. Under the circumstances, we cannot say that the use of courier service in the filing of the principal briefs and appendix in this court was unreasonable. The objection to this charge will be denied. However, we do not believe that the State should bear courier charges for the filing of the post-argument brief or other documents in this court. Although there were some time constraints, the court allowed plaintiff twice as much time (one month) for its supplemental memorandum as the State and we see no need for the use of courier service for the filing of the post-argument brief or other documents when overnight federal express service would have sufficed.

As for telephone, duplicating, and word processing expenses, the State claims that these charges are components of the lawyers' hourly rate. Long distance telephone calls are ordinarily not office overhead and the State offers no authority or plausible argument that they should be so regarded. Photocopying, like long distance calls, is not customarily regarded as overhead and is part of the reasonable attorneys' fee allowed by the Civil Rights Attorneys' Fee Award Act. See Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985). Similarly, we believe that they are also allowable under 42 U.S.C. § 1988.

Unfortunately, we are unable to determine whether the photocopying and long distance calls pertain to matters in the district court or this court. In fairness to the prevailing party, we struggled to ascertain from the record, whenever possible, whether charges were related to matters before this court. The applicants, however, did not provide adequate information. Nonetheless, reasonable inferences were made in favor of the appellees even when we were not totally positive that charges were related to the appeal. However, we can make no inference from bare descriptions of "long distance" or "xeroxing," particularly when we are aware that the prevailing party was, throughout the relevant time period, engaged in other matters unrelated to the appeal in this court, e.g., negotiations with the Pennsylvania Department of Public Welfare. Therefore, virtually all of the claims for photocopying and telephone calls will be denied.

As for the numerous word processing charges, word processing in the modern law office is an accepted technology and considered indispensable for effective and efficient office service. For the most part, word processing has supplanted the typewriter and is considered an indispensable piece of office equipment in an efficient, up-to-date law office. Like the typewriter in its time, word processing equipment today expedites the work of the secretary and accelerates the productivity of the law office. It is a depreciable piece of equipment that serves the convenience and efficiency of the lawyer and appropriately may be regarded as part of the lawyer's overhead. Word

processing services are generally regarded as an overhead component of a lawyer's fee. We need not, however, decide the question in this case "because the fee application fails to adequately document that such fees are in line with community practice as required by Blum v. Stenson, 465 U.S. 897 at n. 11." In Re Olson, 884 F.2d 1415, 1427 (D.C. Cir. 1989). We will, therefore, disallow the word processing charges claimed in connection with this appeal.

G. Items Lacking Specificity

The State contends that WVUH has failed to submit sufficient detail for many charges to enable the court to determine the time spent on the claims in which plaintiff did not prevail and to otherwise inform the court whether the time spent is excessive or otherwise unnecessary. The State further asserts that where the documentation is inadequate to disclose the subject matter of the activity, the hours claimed may not be compensated. Although we do not require absolute precision in a fee reimbursement petition, we do require "some fairly definite information as to the hours devoted to various general activities." Pawlak v. Greenawalt, 713 F.2d 972, 978 (3d Cir. 1983), cert. denied, 464 U.S. 1042 (1984). On occasion we have disallowed requests for fees when the fee petition inadequately documented the hours claimed. Rode v. Dellarciprete, slip op. (3d Cir. Jan 4, 1990).

As already noted, the application for fees and expenses contain in excess of 800 bookkeeping entries. The objections on the ground of non-specificity concern hundreds of these entries, some as minuscule as fifteen cents for photocopying. A court expects, especially in a case where counsel reasonably anticipates that fees will be shifted to the non-prevailing party, that the court will be provided with sufficient supporting data to intelligently make an award. "To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's affidavits --," Blum v. Stenson, 465 U.S. 886, 896, n. 11 (1983), adequately supporting the nature of the charge, even assuming its reasonableness.

Regrettably, after wading through hundreds of entries in search of the necessary supporting information in this application, we find numerous entries have little to offer to pass judgment upon them. Moreover, many of the objections are to items which we have already rejected because they are irrelevant to the appellate proceedings in this court. We believe that the pragmatic approach to the resolution of these objections is to focus only on the items that are sufficiently identified and related to the appeal proceedings in this court. We have given the plaintiff the benefit of all reasonable inferences. Nonetheless, there still remain many items which cannot be sufficiently identified to be allowed.

H. The Fee Application

Plaintiff is also entitled to a reasonable fee in connection with the application for fees in this court and in defending such application. Although WVUH has not provided us with any independent supporting information, we have reasonable familiarity with the services rendered and we have carefully reviewed the application, answers, and briefs, and the hourly rate of counsel. We therefore conclude that we can determine the fees to be allowed. We have modified the sum, however, because the applicant has only been partially successful in its application. The sum of $2,250.00 will be allowed.

IV.

In summary, the fee application before us is logically divisible into three phases of services: first, preparation, briefing, and oral argument on the appeal; second, the submission of the post-argument briefing requested by this court; and third, the fee application to this court. WVUH is entitled as the prevailing party on the central issue on the appeal to reasonable attorneys' fees for services rendered in connection with it. The services rendered on this issue were excellent. It is also entitled to reasonable attorneys' fees and expenses on the subordinate issues related thereto, notwithstanding that it did not prevail on them. The court will not award fees or expenses for WVUH's efforts to

enforce compliance with or to implement the district court's judgment, including activities in connection with its Rule 70 motion to enforce sanctions. Fees for services will not be awarded that represent any unnecessary duplication of effort by counsel or for disbursements that are unsupported by adequate information. Telephone, photocopying, and word processing expenses will be disallowed. Services pertaining to the claim for expert witness fees are unrelated to the issue on which the plaintiff prevailed. Plaintiff's claim for attorneys' fees in connection with the fee application will be allowed in the sum of $2,250.00.

Accordingly, WVUH's application as amended for attorneys' fees will be allowed as follows:

1.	To McGuire, Woods, Battle & Boothe for the first and principal phase of the appeal	$ 38,809.00
	Less excess time for study of Third Circuit Rules	- 890.00
	SUBTOTAL	$ 37,919.00
	Less 15% for administrative appeals issue	- 5,687.85
	Less 10% for expert witness fee issue	- 3,791.90
	ADJUSTED ALLOWANCE	$ 28,439.25
	To Mette Evans and Woodside for phase one of the appeal	$ 3,924.00
	Less time spent at oral argument	- 400.00
	SUBTOTAL	$ 3,524.00

	Less 15% for administrative appeals issue	- 528.60
	Less 10% for expert witness fee issue	- 352.40
	ADJUSTED ALLOWANCE	$ 2,643.00
2.	To McGuire, Woods, Battle & Boothe for phase two of the appeal, the post-argument briefing	$16,330.00
	To Mette Evans and Woodside for phase two	1,923.00
3.	For the third phase, fee application	$ 2,250.00
4.	Allowance for Expenses:	
	To McGuire, Woods, Battle & Boothe	$ 164.80
	To Mette Evans and Woodside	$ 305.00

The foregoing award of attorneys' fees and expenses is made without prejudice to plaintiff's right to make supplemental application to the district court for reasonable fees and expenses to which it may be entitled in the post-judgment phase in that court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Supreme Court, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-994

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

May an award of attorneys' fees under 42 U.S.C. § 1988 include compensation for expert witnesses?

RULE 29.1 LISTING

The listing of subsidiaries and affiliates filed in the Petition for Writ of Certiorari remains accurate.

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No. 89-994

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit (Pet. App. at A-1 to A-49) is reported at 885 F.2d 11. A subsequent decision of the Court of Appeals (Joint App. at 140-59) granting, in part, West Virginia University Hospitals, Inc.'s motion for attorneys' fees and costs has not yet been reported. West Virginia University Hospitals, Inc. v. Casey, No. 89-5165 (3d Cir. March 12, 1990). The opinion of the United States District Court for the Middle District of Pennsylvania (Pet. App. at B-1 to B-68) is reported at 701 F.

Supp. 496. A memorandum opinion of the District Court (Pet. App. at C-1 to C-4) concerning an award of attorneys' fees was not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was issued on September 5, 1989. An order, denying petitioner's timely request for a rehearing, was issued by the Court of Appeals on October 5, 1989. The mandate of the Court of Appeals was issued on October 13, 1989.

The petition for a writ of certiorari was filed on December 22, 1989 and was granted on February 26, 1990.

The jurisdiction of this Court to issue a writ of certiorari in this case is based upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988.
Proceedings in vindication of civil rights; attorney's fees

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS § 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS § 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

West Virginia University Hospitals, Inc., (hereinafter referred to as "WVUH") operates a tertiary medical center[1] in Morgantown, West Virginia, six miles south of the border between the Commonwealth of Pennsylvania and the State of West Virginia. 701 F. Supp. at 498-99 (Findings of Fact Nos. 7, 14, and 15); Pet. App. at B-3 to B-4. It is one of only 121 major academic medical centers in the United States. 701 F. Supp. at 500 (Finding of Fact No. 26); Pet. App. at B-6. WVUH offers several medical services that are not available in the hospitals located in southwestern Pennsylvania. 701 F. Supp. at 499 (Findings of Fact Nos. 14-21); Pet. App. at B-4 to B-5. As a consequence, WVUH is a significant provider of hospital services to Pennsylvania medicaid recipients living in southwestern Pennsylvania. 701 F. Supp. at 498-499 (Findings of Fact Nos. 8-13 and 30-41); Pet. App. at B-3 to B-4 and B-6 to B-8. In fact, WVUH provides inpatient hospital care to more Pennsylvania medicaid recipients than over one-half of the hospitals located in Pennsylvania. 701 F. Supp. at 500 (Finding of Fact No. 42); Pet. App. at B-8.

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1 A "tertiary" hospital provides a level of medical services that is inherently more complex than and is generally not provided by community hospitals. 701 F. Supp. at 499 (Finding of Fact No. 14); Pet. App. at B-4.

In January, 1986, Pennsylvania's Department of Public Welfare notified WVUH of new medicaid payment rates for WVUH's hospital services to Pennsylvania medicaid recipients. Convinced that the new payment rates were contrary to the minimum standards for reimbursement specified in the Social Security Act,[2] WVUH attempted to resolve the problem of its inadequate reimbursement administratively. However, the Pennsylvania Department of Public Welfare informed WVUH that any administrative appeal, based upon the inadequacies of the methodology employed by Pennsylvania in her reimbursement of out-of-state hospitals, would not lead to any relief. See 701 F. Supp. at 521-22; Pet. App. at B-56.

Consequently, in July, 1986, WVUH filed suit in the United States District Court for the Middle District of Pennsylvania. WVUH challenged the adequacy of Pennsylvania's payment system and the adequacy of Pennsylvania's medicaid administrative appeals system under federal law.[3] The jurisdiction of the District Court was based upon 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and (4), and 28 U.S.C. § 1332. WVUH also sought remedies under 42 U.S.C. § 1983 and under 28 U.S.C. § 2201.

In May, 1988, the District Court conducted a six-day trial. At trial, WVUH depended principally upon the testimony of three expert witnesses who testified about the deficiencies in Pennsylvania's payment system for out-of-state hospitals like WVUH and the inadequacy of Pennsylvania's administrative appeals system. After the defense rested, WVUH called a fourth expert witness to rebut testimony provided by the Pennsylvania defendants concerning how Pennsylvania reimbursed hospitals for the costs of direct medical education. The District Court found that these experts' work for WVUH was "essential" to WVUH's success. See Pet. App. at C-1 to C-4.

As the exhibits to the Joint Fee Proposal, which was submitted to the District Court, reflect, WVUH's experts began work in 1986. Joint App. at 112-39. That work included several essential tasks that enabled WVUH's attorneys to prosecute the lawsuit successfully. For example, the experts from Coopers & Lybrand, a nationally recognized accounting and consulting firm, were required to: (1) review and analyze the complex Pennsylvania medicaid reimbursement system for Pennsylvania hospitals; (2) analyze the financial data to determine the probable magnitude of WVUH's financial loss and WVUH's ability to sustain such losses on a continuing basis; (3) review and analyze data provided by the Pennsylvania defendants and the Hospital Association of Pennsylvania through the discovery process; (4) prepare necessary exhibits; and (5) provide advice and educate WVUH's counsel about medicaid reimbursement policies and systems. See Joint App. at 121-22, 131, 133, 135-36. These tasks were made more complicated because they stem from a "Byzantine" statute that is "almost unintelligible to the initiated." Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981). A review of the experts' trial testimony, which laid a foundation for their opinion testimony, provides a partial description of the substantial amount of pretrial work they performed for WVUH and its counsel. See Joint App. at 14-31, 33-48, 62-67, 73-78.

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2 WVUH also believed that the payment rates for non-Pennsylvania hospitals violated the Equal Protection Clause because Pennsylvania discriminated in its payments depending upon whether a hospital was located in Pennsylvania or out-of-state. The evidence at trial proved that, on average, Pennsylvania reimbursed 95% of the costs of Pennsylvania hospitals but only 54% of WVUH's costs in providing care to Pennsylvania medicaid recipients. 701 F. Supp. at 509 (Finding of Fact No. 183); Pet. App. at B-29; see also n.3 infra.

3 WVUH alleged four causes of action in its complaint:
(1) the inadequacy of the payment system under 42 U.S.C. § 1396a(a)(13)(A);
(2) the lack of any basis-in-fact for the assurances Pennsylvania officials provided the Federal Government about the payment system as required by 42 U.S.C. § 1396a(a)(13)(A);
(3) the inadequacy of the administrative appeals system under 42 U.S.C. § 1396a(a)(37) and the implementing federal regulations; and
(4) a violation of the Equal Protection Clause of the United States Constitution due to the irrational discrimination in payments made by Pennsylvania's medicaid program to out-of-state hospitals as contrasted to payments made to in-state hospitals.

WVUH needed well-qualified experts to overcome the presumptions that normally attach to state officials' actions and to demonstrate the illegality of Pennsylvania's prospective payment system. Especially well-qualified experts were needed also because, prior to this lawsuit, no plaintiff had successfully challenged a state's prospective payment system;[4] accordingly, both counsel and the District Court were charting new waters.[5]

WVUH's experts included Dr. Gerard Anderson, the Director of the Johns Hopkins Center for Hospital Finance and Management, the only academic-based research center in the United States that is devoted to hospital finance and reimbursement. See Joint App. at 50. Dr. Anderson was formerly the principal technical consultant on hospital reimbursement to the United States Secretary of Health and Human Services. Joint App. at 54-57. In that position, he helped design, explain to Congress, and implement the Medicare Program's prospective payment system for hospitals. Id. That experience was invaluable to WVUH not only at trial but also during the pretrial preparation of the case.

Likewise, Dr. Paul Grimaldi, the Director of Health Economics Reimbursement Policy at Coopers & Lybrand, is a nationally recognized expert on prospective payment systems, having pioneered the nation's first medicaid prospective payment system in New Jersey. Joint App. at 69-70. An author of books that are considered source

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4 During the course of the lawsuit before the District Court, the only other directly applicable federal precedent concerning a challenge to a medicaid prospective payment system was Mary Washington Hospital v. Fisher, 635 F. Supp. 891 (E.D. Va. 1985). In that case, the hospital was unsuccessful in its challenge.

5 The novelty of a case has been recognized as one of the factors that ought to be taken into account when awarding fees. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974) (cited with approval in Blanchard v. Bergeron, 491 U.S. __ , 109 S. Ct. 939, 943, 103 L. Ed. 2d 67, 74 (1989)). Accordingly, the novelty of this case highlights the need for experts to vindicate WVUH's rights under federal law.

authorities about prospective payment, see Joint App. at 70, Dr. Grimaldi's experience as an economist, as a former state medicaid official, and as a state hospital association official, Joint App. at 68-70, made him both an effective witness at trial and an invaluable resource to WVUH's counsel during the pretrial preparation of the case.

Based upon the evidence provided by WVUH's experts,[6] the District Court declared that Pennsylvania's payment system and her administrative appeals system violated federal law. 701 F. Supp. at 526; Pet. App. at B-67. The District Court ordered the Pennsylvania defendants to develop new payment and appeals systems by May 1, 1989. The District Court also awarded fees under 42 U.S.C. § 1988 after submission of a joint fee proposal by the parties. Joint App. at 112; see also Pet. App. at C-1 to C-4.

In making the fee award, the District Court included experts' fees of $104,133.00, having concluded that the experts' work was "essential" to the District Court's decision. Pet. App. at C-2. Indeed, the detailed factual findings of the District Court's initial memorandum opinion reveal not only the complexity of the case but also the court's heavy reliance upon WVUH's experts. See 701 F. Supp. at 498-510; Pet. App. at B-2 to B-32. The testimony of Doctors Anderson and Grimaldi, as well as the testimony of Messrs. Manak and Maher, WVUH's other expert witnesses, is repeatedly cited as the basis for many of the District Court's 201 findings of fact. Id. Given the detail of the experts' testimony, it is readily apparent that the experts expended almost two years in intense pretrial work and that this pretrial work engendered the vast majority of the fees owed by WVUH to its experts. See Joint App. at 120-39.

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6 The Pennsylvania defendants quickly stipulated to each expert's qualifications and technical expertise to provide testimony to the court. Joint App. at 48-49, 62-64, 78, 91.

Moreover, in the joint fee proposal submitted by WVUH and the Pennsylvania defendants to the District Court, the parties stipulated that the experts' work, which encompassed both pretrial and trial work, was "necessary" and that $104,133.00 was a reasonable amount of compensation for such work. See Joint App. at 117. This stipulation as to the necessity of the experts is consistent with an earlier stipulation that the case was "complex," involved technical issues outside the normal competency of attorneys, and required extensive pretrial work. See Joint App. at 8 ("This case involves complex questions of hospital and governmental accounting which require detailed preparation of preliminary studies . . . .") (emphasis added).

The Court of Appeals for the Third Circuit ultimately affirmed the District Court in all but two respects. First, the Court of Appeals held that experts' fees were not compensable in an award of attorneys' fees under 42 U.S.C. § 1988. 885 F.2d at 35; Pet. App. at A-48.[7] Secondly, the Court of Appeals reversed the District Court on the issue of the adequacy of Pennsylvania's administrative appeals system. 885 F.2d at 35; Pet. App. at A-49.

The Court of Appeals refused to rehear the case as requested by WVUH. Consequently, WVUH petitioned this Court for a writ of certiorari. That writ was granted on February 26, 1990.

SUMMARY OF ARGUMENT

In 1975, this Court held that federal courts do not inherently possess the equitable power to award attorneys' fees to a prevailing party under the "private attorney general" theory. Alyeska Pipeline

7 Subsequently, on March 12, 1990, the Court of Appeals granted, in part, WVUH's motion for attorneys' fees and costs. The Court of Appeals, however, reduced its award of attorneys' fees to WVUH by 10% because WVUH failed to prevail on appeal on the experts' fees issue. West Virginia University Hospitals, Inc. v. Casey, No. 89-5165, slip op. at 11 (3d Cir. March 12, 1990); Joint App. at 148-49, 158.

Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Subsequently, Congress acted promptly to abrogate the effects of Alyeska upon civil rights litigation by enacting the fee shifting provision in 42 U.S.C. § 1988.

Because Congress' policy or purpose controls over the literal or "plain" language of any Act of Congress, Watt v. Alaska, 451 U.S. 259 (1981), the legislative history of the fee shifting provision of 42 U.S.C. § 1988 is important. The events of 42 U.S.C. § 1988's passage reflect Congress' conclusion that a full and complete remedy was essential to ensure that the right to sue was a meaningful one. See, e.g., H. R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). This Court acknowledged Congress' purpose when it held that certain non-attorney expenses (paralegals) were compensable under 42 U.S.C. § 1988 in order to achieve the "fully compensatory" award Congress intended. Missouri v. Jenkins, 491 U.S. __, 109 S. Ct. 2463, 2470, 105 L. Ed. 2d 229, 242 (1989).

Given Congress' purpose, WVUH respectfully submits that this Court should hold that experts' fees were intended to be encompassed within the Congressional grant of discretion to the federal courts. If experts' fees were not compensable under 42 U.S.C. § 1988, plaintiffs would be discouraged, not encouraged, from bringing private enforcement actions, particularly in complex cases. Therefore, to give effect to Congress' acknowledged policy, this Court should hold that experts' fees are compensable.

This Court has avoided mechanical and ill-considered literal interpretations of statutes if such would emasculate or contradict Congressional policy. See, e.g., Markham v. Cabell, 326 U.S. 404, 409 (1945). In that tradition, the term "reasonable attorney's fee" should be construed as a "shorthand expression for such fees and other expenses as the district court might in the exercise of its equitable discretion reasonably believe should be reimbursed . . . ." Friedrich v. City of Chicago, 888 F.2d 511, 518 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230); see also H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S.

Code Cong. & Admin. News 1798, 1808 (in fee shifting statutes, Congress intends the term "reasonable attorneys' fees" to include experts' fees).

The discretion to award a "reasonable attorney's fee" is a broad power, intended to restore the pre-Alyeska practices of the federal courts, which included awards of experts' fees, either pursuant to a court's equitable powers, e.g., Bradley v. School Board of the City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974),[8] or pursuant to existing fee shifting statutes from which the language of § 1988 was derived. E.g., Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974).[9]

Furthermore, the Senate Report explaining the bill explicitly referred to three pre-Alyeska cases as exemplifying the standards that would govern awards under § 1988; one of those cases awarded experts' fees. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5913 (citing Davis v. County of Los Angeles). Accordingly, Congress intended to embrace awards of experts' fees within the broad nomenclature of "reasonable attorney's fee."

The avoidance of an ill-considered "plain meaning" construction also avoids a form of increased judicial activism that effectively reduces the power of the legislature by adopting limiting constructions of statutes and, thus, failing to effect their underlying policies fully. Posner, Statutory Interpretation - In The Classroom And In The Courtroom, 50 U. Chi. L. Rev. 800, 822 (1983), reprinted in 3 Sutherland Stat. Const. 629, 645 (4th ed. 1984). This approach to

8 For a more complete listing of pre-Alyeska precedent based upon the courts' equitable powers, see n.15 infra.

9 For a more complete listing of pre-Alyeska precedent involving other fee shifting statutes, see n.20 infra.

statutory construction is fully consistent with this Court's conclusion that "the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" Watt v. Alaska, 451 U.S. at 266.

This Court adopted a broad interpretation, rather than a limited "plain meaning" interpretation, of the term "reasonable attorney's fee" in Missouri v. Jenkins. Under Congress' policy of encouraging private enforcement actions, no reason exists to discriminate between attorneys and paralegals. Similarly, under the same policy, no basis exists on which to discriminate between attorneys and experts. Both paralegals and experts help the attorney prepare the case so that there may be a prevailing plaintiff who can ask for fees under § 1988.

While both paralegals and experts assist counsel, it would be ironic, indeed, to pay the fees of paralegals in order to encourage private enforcement of federal law but not the fees of far more valuable and indispensable experts. Thus, under Missouri v. Jenkins, experts' fees should be compensable in order to provide a prevailing party with a fully compensatory fee.

The Third Circuit's erroneous decision in this case was predicated upon its reliance upon an inapplicable precedent and its concomitant failure to apply controlling precedent. Specifically, the Third Circuit relied upon Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987), rather than on Missouri v. Jenkins. West Virginia University Hospitals, Inc. v. Casey, 885 F.2d at 34; Pet. App. A-47.

By its own terms, Crawford is not controlling: firstly, because it did not construe § 1988; and secondly, because it cites § 1988 as an exception to the general applicability of 28 U.S.C. § 1821 and 28 U.S.C. § 1920, the statutes at issue in Crawford. 482 U.S. at 444. Furthermore, 28 U.S.C. § 1821 does not encompass non-testimonial work of experts which, in this case, was the source of the majority of the experts' fees generated. Therefore, even if § 1821 had any applicability, it would not preclude reimbursement of non-testimonial work performed by experts.

The Third Circuit's rejection of Missouri v. Jenkins was error. Missouri v. Jenkins held that a literal reading of § 1988 was too limited to give proper effect to Congress' purpose of providing for a "fully compensatory fee." 109 S. Ct. at 2470, 105 L. Ed. 2d at 242. Likewise, a literal reading of § 1988 is too limited in this case if WVUH is to receive a "fully compensatory fee." The experts' work in this case was "essential" to the effective presentation of the client's case. Pet. App. at C-2. Therefore, their work should be reimbursed because, otherwise, the Congressional policy of encouraging private enforcement actions would be defeated.

ARGUMENT

I.
Experts' Fees Must Be Compensable Under 42 U.S.C. § 1988 In Order To Achieve Congress' Goal of Encouraging Private Enforcement Of The Civil Rights Statutes.

In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), this Court held that federal courts do not inherently possess the equitable power to award fees to a prevailing party in litigation under the "private attorney general" theory. Instead, this Court reaffirmed the general "American Rule" that a prevailing party may not recover fees.

The reaction of the Congress to Alyeska was prompt, decisive, and without substantial debate. A mere five months after the announcement of Alyeska, Congress conducted hearings upon legislation designed to abrogate the effects of Alyeska, and a year later, in 1976, Congress enacted the fee shifting provision in 42 U.S.C. § 1988. The substantial unanimity within and without the Congress for this legislation is noteworthy. See Awarding of Attorneys' Fees: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of

Justice of the Committee on the Judiciary House of Representatives, 94th Cong., 1st Sess. 1 (1975).[10] The swift, concerted action of both Congress and the public in effecting the passage of § 1988's fee shifting provision is crucial to a proper contextual understanding of what Congress sought to do.

The policy or purpose of Congress controls the literal language of a statute.[11] See Watt v. Alaska, 451 U.S. 259, 266 (1981). Consequently, it is incumbent upon this Court to ascertain Congress' policy and honor it regardless of the "rule" of construction concerning the "plain meaning" of the statute.

Following that precept, this Court has already acknowledged that Congress' policy decision in enacting § 1988's fee shifting provision was to provide a prevailing party with a "fully compensatory fee." Missouri v. Jenkins, 491 U.S. __ , 109 S. Ct. 2463, 2470, 105 L. Ed.

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10 The eight bills under consideration were opposed by only five organizations, and that opposition was not absolute. For example, Mr. Rex E. Lee, then with the United States Justice Department, opposed some of the proposed bills but noted the need for an exception to the American Rule in civil rights cases. See Awarding of Attorneys' Fees: Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 1, 178-79 (1975). By contrast, numerous organizations and individuals, many of whom were members of Congress, supported the legislation at the hearings. Id.

11 Legislative "intent" and legislative "meaning" are not necessarily identical. The former is an inquiry into what the legislature as a body thought it was doing, while the latter is an inquiry into what the public perceives and understands the law to be after enactment. An analysis of legislative intent, which is oriented to the message of the legislature as the "sender," differs from the analysis of legislative meaning, which focuses upon the perception of the public as the "receiver" of the legislative message. See 2A Sutherland Stat. Const. §§ 45.06 to 45.08 (4th ed. 1984). Although these analyses may lead to different conclusions in a particular case, the unanimity of Congressional and public sentiment indicates that these analyses lead to the same result in this case, i.e., restoration of the pre-Alyeska practices which included awards of experts' fees.

2d 229, 242 (1989); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). That conclusion is amply supported by the history of § 1988's amendment to authorize fee awards. See, e.g., H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) ("Unless the judicial remedy is full and complete, it will remain a meaningless right."); S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.") (emphasis added).

Repeatedly, the House and Senate reports sound the same themes: (1) effective enforcement of the civil rights statutes depends upon the efforts of private citizens;[12] (2) as potential defendants, governmental entities and officials have substantial resources available to them that are not available to private citizens absent a fee shifting statute; (3) the opportunity to vindicate federal rights must be meaningful; (4) the lack of fee shifting will frustrate federal law, if not be tantamount to its repeal; (5) Congress has always instructed the courts to use the

12 WVUH's enforcement of federal law is an example of the need for private enforcement. Although, in theory, the Secretary of the United States Department of Health and Human Services can deny federal matching funds to a state's medicaid program on the basis of noncompliance with federal law, 42 U.S.C. § 1396c, that form of enforcement is a last resort. The only effective mechanism by which to enforce federal medicaid law is through private enforcement actions. Cf. Cannon v. University of Chicago, 441 U.S. 677, 705-06 (1979) (private enforcement of federal law "is not only sensible but is also fully consistent with -- and in some cases even necessary to -- the orderly enforcement of the statute"). This point is illustrated in this type of case by the fact that federal approval of a state's medicaid reimbursement plan is not a difficult or detailed process. At best, it is perfunctory. West Virginia University Hospitals, Inc. v. Casey, 701 F. Supp. at 510, 514-15; Pet. App. at B-32, B-41 to B-42; cf. Amisub (PSL) v. State of Colorado, Department of Social Services, 879 F.2d 789 (10th Cir. 1989) (federal approval of state's reimbursement plan did not signify any independent evaluation of the adequacy of that plan by the Federal Government).

"broadest and most effective remedies" to achieve compliance with federal civil rights laws; and (6) federal courts should be able to "continue" their pre-Alyeska practices. Compare H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) with S. Rep. No. 1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. Code Cong. & Admin. News 5908.

To achieve a "fully compensatory fee" courts must consider all legitimate categories of litigation expense; otherwise, all of the concerns noted by Congress cannot be satisfied. Experts, a recurring reality of modern litigation, cannot be ignored if the goal of a fully compensatory fee is to be achieved in order to encourage private enforcement actions. Such litigation implements national policy far more realistically than the mere placing of a statute in the statute books. Without experts, the number and success of private enforcement actions in an array of important areas of national policy will abate, leaving the federal statutes as nothing more than hollow promises of a better America.

Litigation under the civil rights statutes should not be allowed to fall prey to the exquisite perfection of linguistic purists who care little for the practical effects of their pronouncements. As a matter of federal policy -- from the perspective of any one of the three branches of our government -- it is better to have less-than-perspicuous language fairly and practicably construed to give national policy its full intended effect than it is to insist upon an overly parochial interpretation that pulls the teeth out of that policy.

A plaintiff must prove his case against government officials. That effort involves having to rebut presumptions of official regularity, correctness, and official expertise, as well as having to overcome judicial deference to administrative interpretations of law and discretionary acts. Under these circumstances, a plaintiff usually could not prove his case without experts. And, unfortunately, as so aptly expressed by the First Circuit, "Talk may be cheap, but expert testimony usually is not." Denny v. Westfield State College, 880 F.2d 1465, 1466 (1st Cir. 1989).

Given the need for experts and the consequential expense to the plaintiff, how can the unambiguous policy of encouraging vindication of federal rights be fulfilled if the fees for such experts cannot be shifted? Without any ability to have experts, a plaintiff so brave as to file suit would be limited to cross-examining the state's experts. Such a consequence is utterly at odds with the purpose of encouraging the vindication of federal rights. That purpose requires an equalization of resources, especially when the defendants can call upon the immense resources of state government.[13]

A corollary, in this instance, to the honoring of legislative purpose is the presumption that Congress does not enact statutes that do not realistically or practicably achieve the policy adopted:

> The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes . . . . The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.

Markham v. Cabell, 326 U.S. 404, 409 (1945).

While everyone agrees that § 1988 allows a prevailing party to recover the fees he has paid directly to his lawyer, that salutary remedy is unavailing if the plaintiff's inability to afford the services of essential experts prevents the lawyer from proving the case. Accordingly, a limited, "plain language" reading of the statute makes § 1988's promise of a full and complete judicial remedy an empty one.

Simply but accurately, § 1988's reference to a "reasonable attorney's fee" is nothing more than a generally stated directive to pay a prevailing party "what it costs" to prevail.[14] See S. Rep. No. 1011, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910 ("citizens must have the opportunity to recover what it costs them to vindicate these rights in court") (emphasis added); see also Friedrich v. City of Chicago, 888 F.2d 511, 518 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230) ("Reasonable attorney's fee" is a "shorthand expression for such fees and other expenses as the district court might in the exercise of its equitable discretion reasonably believe should be reimbursed to the prevailing party . . . . [I]t is not an exhaustive description [of the

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13 In this case, the equalization of resources is vital to hospitals like WVUH. Under current hospital reimbursement methodologies employed by governmental and private payers, WVUH has little or no ability to shift costs, and any financial reserves that exist are devoted to necessary future capital improvements and technological advancements. The entire concept of prospective payment rests upon the abandonment of reimbursement based upon the actual costs of a hospital, as was the case under the former standards of reimbursement for the Medicaid and Medicare Programs. That approach has been imitated by private payers who negotiate rates for their subscribers. Thus, if WVUH hires an expert, that expense is not routinely passed along and divided up between the different payers. At WVUH, medicaid covers 23% of its patients, medicare covers 27% of its patients, and commercial payers (HMOs, PPOs, Blue Cross/Blue Shield, and insurance companies) cover 30% of its patients. See Trial Transcript at 170 (May 3, 1988). Because charity and bad debt constitute the remaining 20% of WVUH's patients, id., WVUH's ability to shift costs further is virtually non-existent. Such expenses erode reserves intended for other necessary purposes, and, thus, a fully compensatory fee award is essential.

14 The economics of modern civil rights litigation also fully warrant the Congressional policy of providing a fully compensatory award of fees to a prevailing party. Actions are often against state officials in federal court where, due to the Eleventh Amendment, damage awards cannot be made, which could otherwise be a source of remuneration for the expenses of litigation. Cf. Riverside v. Rivera, 477 U.S. 561, 574-75 (1986) (commenting upon the lack of, or smallness of, damage awards to civil rights litigants). Rarely, if ever, are contingent fee agreements used which could be sources of remuneration. Lastly, civil rights litigation does not carry with it such potential relief as treble damages which could be a source of funds. Without any of these potential sources of money to pay necessary experts, the "full and complete" nature of a § 1988 remedy is jeopardized by any construction that does not include fees for experts.

fees that may be reimbursed] . . . ."); cf. H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 (Congress specifically states its intent that the term "reasonable attorneys' fees," when used in fee shifting statutes, includes fees of experts).

When Congress acted to overturn Alyeska, neither it nor the public indulged in the listing of discrete legal expenses, including some for payment and omitting others. If Congress had done so, a cautious and narrow construction of § 1988 might well be appropriate. Instead, Congress acted quickly and broadly to ensure that federal courts returned to the pre-Alyeska practice of paying all reasonable fees, meaning the entire expense of the litigation from its initiation to its conclusion. Surely, if Congress had decided otherwise, it would have manifested that intent somewhere within the legislative history. It did not, however. Nor did it indicate that the statute should be narrowly or literally construed so as to restrict fee awards to those fees generated by only the attorneys themselves.

Instead, the Senate Report noted that the policy was to provide the courts with the traditional equitable authority they had exercised prior to Alyeska. S. Rep. No. 1011, 94th Cong., 2d Sess. 4, 6, reprinted in 1976 U.S. Code & Cong. News 5911, 5913. The federal courts' pre-Alyeska practice of awarding fees to experts under the traditional equitable authority of the courts, therefore, demonstrates what Congress hoped to achieve with the fee shifting provision of § 1988.[15]

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15 Prior to the Alyeska decision, federal courts commonly exercised their equitable powers to award experts' fees as part of attorneys' fees awards to prevailing parties. See, e.g., Wolf v. Frank, 477 F.2d 467, 480 (5th Cir.), cert. denied, 414 U.S. 975 (1973); Kinnear-Weed Corp. v. Humble Oil & Refining Co., 441 F.2d 631, 636-37 (5th Cir.), cert. denied, 404 U.S. 941 (1971); Bebchick v. Public Utilities Commission, 318 F.2d 187, 204 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); Wallace v. House, 377 F. Supp. 1192, 1206-07 (W.D. La. 1974), vacated in relevant part for reconsideration in light of Alyeska, 515 F.2d 619 (5th Cir. 1975), vacated on other grounds, 425 U.S. 947 (1976); Sabala v. Western

In fact, the Senate Report listed or cross-referenced some pre-Alyeska decisions that sanctioned the payment of experts' fees pursuant to a court's equitable powers.[16] Id. at 5912 and n.3. In one of these cases,

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Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), remanded in relevant part for reconsideration in light of Alyeska, 516 F.2d 1251 (5th Cir. 1975), vacated on other grounds, 431 U.S. 951 (1977); Sims v. Amos, 340 F. Supp. 691, 695 n.11 (M.D. Ala.), aff'd, 409 U.S. 942 (1972); La Raza Unida v. Volpe, 57 F.R.D. 94, 102 (N.D. Cal. 1972); Beens v. Erdahl, No. 4-71-Civ. 151 (D. Minn. Dec. 14, 1972), summarized in Legal Fees--Hearings before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary, 93d Cong., 1st Sess. 911 (1973); Jones v. Wittenberg, 330 F. Supp. 707, 722 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (6th Cir. 1972); Bradley v. School Board of the City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974); Wright v. McMann, Civ. Nos. 66-CV-77, 67-CV-174 (N.D.N.Y. unpublished decree of August 19, 1970), cited in Wallace v. House, 377 F. Supp. at 1207, aff'd in part, rev'd in part on other grounds, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885 (1972); see also Copeland v. School Board of the City of Portsmouth, 464 F.2d 932, 934 (4th Cir. 1972) (decision to award experts' fees left to discretion of the trial judge); Banks v. Chicago Mill & Lumber Co., 106 F. Supp. 234, 236 (E.D. Ark. 1950) (court has equitable "power to allow as costs the compensation paid to expert witnesses for their preparation and testimony"); Swan Carburetor Co. v. Chrysler Corp., 55 F. Supp. 794, 796 (E.D. Mich. 1944) (court has equitable power to award experts' fees and expenses in appropriate cases), aff'd in relevant part, rev'd in part on other grounds, 149 F.2d 476 (6th Cir. 1945); Andresen v. Clear Ridge Aviation, 9 F.R.D. 50, 52 (D. Neb. 1949) (court has equitable power to award experts' fees to prevailing party); cf. Welsch v. Likins, 68 F.R.D. 589, 596-97 (D. Minn.) (experts' fees and expenses awarded pursuant to court's equitable powers in decision rendered 10 days after Alyeska), aff'd, 525 F.2d 987 (8th Cir. 1975).

16 E.g., La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1973) (cited in Alyeska at n.46); Sims v. Amos, 340 F. Supp. 691, 695 n.11 (M.D. Ala.), aff'd, 409 U.S. 942 (1972); Bradley v. School Board of the City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974); see also Beens v. Erdahl, No. 4-71-Civ. 151 (D. Minn. Dec. 14, 1972), summarized in Legal Fees--Hearings before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary, 93d Cong., 1st Sess. 911 (1973).

this Court vacated the Fourth Circuit's reversal of a district court award of fees that had included experts' fees; this Court then remanded that case for a new fee award, presumably one that would include experts' fees.[17]

In explaining the standards intended to govern fee awards, the Senate Report also specifically endorsed three pre-Alyeska cases, one of which included an award of experts' fees under the Title VII fee shifting statute. Id. at 5913 (citing Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974)). The importance of these cases in ascertaining Congress' intent has been noted previously by this Court. See Blanchard v. Bergeron, 491 U.S. __, 109 S. Ct. 939, 944, 103 L. Ed. 2d 67, 75 (1989). Thus, the conclusion compelled is that § 1988 authorizes the payment of experts' fees to a prevailing party.[18] Indeed, courts have recognized that experts' fees may be included as part of an award of attorneys' fees under § 1988.[19]

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17 See Bradley v. School Board of the City of Richmond, 53 F.R.D. 28, 44 (E.D.Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974).

18 Reports of Senate or House committees have long been recognized sources of authoritative legislative history. See Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986); Blanchard v. Bergeron, 491 U.S. __, 109 S. Ct. 939, 943, 103 L. Ed. 2d 67, 73-74 (1989).

19 See, e.g., Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230); SapaNajin v. Gunter, 857 F.2d 463, 465 (8th Cir. 1988); Jenkins v. Missouri, 838 F.2d 260, 266 (8th Cir. 1988), aff'd, 491 U.S. ___, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989); Culebras Enterprises Corp. v. Rivera-Rios, 846 F.2d 94, 103 (1st Cir. 1988); Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 257 (8th Cir. 1985); American Family Life Assurance Co. v. Teasdale, 733 F.2d 559, 571 (8th Cir. 1984); Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983); Strama v. Peterson, 689 F.2d 661, 663 (7th Cir. 1982); Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201, 205-06 (3d Cir. 1981); Miller v. Carson, 628 F.2d 346, 349 (5th Cir.

Congress' selection of the term "reasonable attorney's fee" was not a new effort in creative drafting. In 1976, several statutes already employed the term, e.g., the Title VII fee shifting statute, 42 U.S.C. § 2000e-5(k). These statutes served as models for the language of § 1988. S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910. Importantly, courts had already interpreted the term "reasonable attorney's fee" to include experts' fees.[20] For example, Davis v. County of Los Angeles, one of

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1980); Williams v. City of New York, 728 F. Supp. 1067, 1072 (S.D.N.Y. 1990); Black Grievance Committee v. Philadelphia Electric Co., 690 F. Supp. 1393, 1403 (E.D. Pa. 1988); United States v. Yonkers Board of Education, 118 F.R.D. 326, 330 (S.D.N.Y. 1987); Jones v. City of Chicago, No. 83-C-2430 (N.D. Ill. Nov. 10, 1987), rev'd in part on other grounds, 856 F.2d 985, 996 (7th Cir. 1988); Hillburn v. Commissioner, Connecticut Department of Income Maintenance, 683 F. Supp. 23, 27 (D. Conn. 1987), aff'd mem., 847 F.2d 835 (2d Cir. 1988); Lenihan v. City of New York, 640 F. Supp. 822, 830 (S.D.N.Y. 1986); Kirksey v. Danks, 608 F. Supp. 1448, 1459 (S.D. Miss. 1985); Rank v. Balshy, 590 F. Supp. 787, 801 (M.D. Pa. 1984); Rybicki v. State Board of Elections of State of Illinois, 584 F. Supp. 849, 861-62 (N.D. Ill. 1984); McMurry v. Phelps, 533 F. Supp. 742, 774 (W.D. La. 1982); N.A.A.C.P. v. Wilmington Medical Center, Inc., 530 F. Supp. 1018, 1027 (D. Del. 1981), remanded for full award of attorneys' fees, 689 F.2d 1161 (3d Cir. 1982), cert. denied, 460 U.S. 1052 (1983); Commonwealth of Pennsylvania v. O'Neill, 431 F. Supp. 700, 713-715 (E.D. Pa. 1977).

20 See, e.g., Tasby v. Estes, 416 F. Supp. 644, 648 (N.D. Tex. 1976) (expert witness fees are compensable pursuant to fee shifting provisions of Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (repealed 1979)); Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974) (expert witness fees are compensable pursuant to fee shifting provisions of Title VII); see also Norris v. Green, 317 F. Supp. 100, 102 (N.D. Ala. 1965) (expert fees awarded pursuant to Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501(b)). Each of these cases involved a statute specifically cited in the legislative history of § 1988. See H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 and Appendix A (1976).

the three cases specifically identified as a model for fee awards under § 1988, involved an award of experts' fees to a prevailing party under the Title VII fee shifting statute. 8 Fair Empl. Prac. Cas. (BNA) at 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444.[21] Accordingly, Congress' conscious decision to use existing terminology with an established meaning

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21 Since 1976, federal courts have continued to rule that expert witness fees may be awarded to prevailing parties as part of an attorney's fee award made under fee shifting statutes similarly worded to § 1988. See, e.g., Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984) (Age Discrimination in Employment Act, 29 U.S.C. §§ 262(b) and 216(b)), cert. denied, 472 U.S. 1027 (1985); Chang v. Board of Education of Glen Ridge Township, 685 F. Supp. 96, 100 (D.N.J. 1988) (Education for All Handicapped Children Act, 20 U.S.C. § 1415(e)(4)(B)); Johns v. Whirlpool Corp., Civ. A. No. 86-2003 (D. Kan. Feb. 4, 1988) (Age Discrimination in Employment Act, 29 U.S.C. §§ 262(b) and 216(b)); Bruno v. Western Electric Co., 618 F. Supp. 398, 405-06 (D. Colo. 1985) (Age Discrimination in Employment Act, 29 U.S.C. §§ 262(b) and 216(b)), aff'd in part, rev'd in part on other grounds, 829 F.2d 957 (10th Cir. 1987); Cook v. Block, 609 F. Supp. 1036, 1043 (D.D.C. 1985) (Title VII, 42 U.S.C. § 2000e-5(k)); Kirksey v. Danks, 608 F. Supp. 1448, 1459 (S.D. Miss. 1985) (Voting Rights Act, 42 U.S.C. § 1973l(e)); Feher v. Department of Labor & Industrial Relations, 561 F. Supp. 757, 768 (D. Haw. 1983) (Title VII, 42 U.S.C. § 2000e-5(k)); Greenspan v. Automobile Club of Michigan, 536 F. Supp. 411, 416 (E.D. Mich. 1982) (Title VII, 42 U.S.C. § 2000e-5(k)); Russell v. Curtin Matheson Scientific, 27 Fair Empl. Prac. Cas. (BNA) 1336, 1336 (S.D. Tex. 1981) (Age Discrimination in Employment Act, 29 U.S.C. §§ 262(b) and 216(b)); Connor v. Winter, 519 F. Supp. 1337, 1345 (S.D. Miss. 1981) (Voting Rights Act, 42 U.S.C. § 1973l(e)); Johnson v. Weed Eaters, Inc., 20 Fair Empl. Prac. Cas. (BNA) 1782, 1783-84 (S.D. Tex. 1979) (Title VII, 42 U.S.C. § 2000e-5(k)); Equal Employment Opportunity Commission v. Datapoint Corp., 412 F. Supp. 406, 409-10 (W.D. Tex. 1976) (Title VII, 42 U.S.C. § 2000e-5(k)), remanded, 570 F.2d 1246 (5th Cir.), on remand, 459 F. Supp. 668, 672 (W.D. Tex. 1978) (costs specified in 1976 decision remain recoverable by prevailing party under Title VII, 42 U.S.C. § 2000e-5(k)); see also Sledge v. J. P. Stevens & Co., Inc., 24 Empl. Prac. Dec. (CCH) ¶ 31,244 (E.D.N.C. 1980) (Title VII case in which successful plaintiffs awarded expert fees for analysis of computerized employee data); cf. Mathis v. Spears, 857 F.2d 749, 758-59 (Fed. Cir. 1988) (award of expert witness fees may be made pursuant to 35 U.S.C. § 285, which provides that a court, in exceptional cases, may award reasonable attorneys' fees to the prevailing party).

demonstrates an agreement with that interpretation and a desire to adopt it for the purposes of § 1988.

In fact, since 1976, the Congress has specifically noted with respect to more recent fee shifting statutes that the term "reasonable attorneys' fees" is intended to include experts' fees:

> The conferees intend that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case in the action or proceeding as well as traditional costs incurred in the course of litigating a case.

H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 (concerning the fee shifting provision in The Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(B), which uses the term "reasonable attorneys' fees") (emphasis supplied). Thus, Judge Posner's description in Friedrich is completely accurate: "reasonable attorney's fee" is a "shorthand expression" for what it reasonably costs to prevail, including experts' fees. Friedrich v. City of Chicago, 888 F.2d at 518.

The legislative process to which the fee shifting provision of § 1988 was subjected was devoid of any political compromise in which proponents of the bill conceded coverage of experts' fees. Nothing in the legislative history supports a restriction upon the policy of encouraging private enforcement of federal law by awarding a fully compensatory fee to a prevailing party. Again, experts' fees were subsumed under the general nomenclature of "reasonable attorneys' fee." Id.; accord Fairley v. Patterson, 493 F.2d 598, 606 n.11 (5th Cir. 1974) ("Court costs not subsumed under federal statutory provisions normally granting such costs against the adverse party [citation omitted] are to be included in the concept of attorneys' fees."); H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 (in fee shifting statutes,

Congress intends the term "reasonable attorneys' fees" to include experts' fees).

Even if the legislative history were not as clear as it is, that does not necessarily mean that a limited, plain meaning construction applies to 42 U.S.C. § 1988. Judge Robert E. Keeton has proposed a four-step analysis for statutory construction in a situation where legislative history is not entirely dispositive. Judge Keeton's proposal, described as a "significant contribution" to the literature concerning statutory construction,[22] is as follows:

> First: Apply the mandate of the statute if it appears that the legislature did in fact both consider and prescribe for the problem at hand.
>
> Second: If the problem falls beyond the core area that the legislature both considered and prescribed for, defer to the legislature's manifested determinations of principle and policy to the extent they can be ascertained and are relevant to the problem at hand.
>
> Third: Subject to the obligations to apply the legislature's mandate and defer to its manifestations of principle and policy, resolve the problem at hand in a way that in the court's view produces the best total set of rules, including those within the core area of the statute and other cognate rules of law, whatever their source.
>
> Fourth: In deciding the scope of both the legislature's mandate and its manifestations of principle and policy, appraise the available evidence candidly and without resort to any contrary-to-fact presumptions; employ a rebuttable presumption that the legislature is ordinarily clear about its considered mandates, leaving courts to act in accordance with the second and third guidelines with respect to questions it does not clearly answer.

2A Sutherland Stat. Const. § 45.09 at 41 (4th ed. 1984) (emphasis added). Under this approach, Congress' policy of providing a fully compensatory fee, or "what it costs," requires a construction that includes compensation of experts under § 1988.

Judge Keeton's proposal is similar to Judge Posner's approach in construing 42 U.S.C. § 1988:[23]

> When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation -- it is interpretation in a sense that has been orthodox since Aristotle -- for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words. That is what the Supreme Court did in the Jenkins case.

Friedrich v. City of Chicago, 888 F.2d at 514; see also Posner, Statutory Interpretation -- In The Classroom And In The Courtroom, 50 U. Chi. L. Rev. 800, 817-22 (1983), reprinted in 3 Sutherland Stat. Const. 629, 641-645 (4th ed. 1984).

What can be gleaned from Judge Keeton's and Judge Posner's approaches is that mechanical application of the plain meaning rule

---

22 2A Sutherland Stat. Const. § 45.09 at 41 (4th ed. 1984).

23 WVUH notes, however, that Judge Posner quite correctly identified and relied upon the dispositive nature of § 1988's legislative history. See, e.g., 888 F.2d at 518.

without further inquiry can result in an erroneous construction of a statute that blunts the policy of the legislature. As Judge Posner points out, courts that automatically seek the panacea of "plain meaning," without some considered thought, engage in a form of increased judicial activism that reduces the power of the legislative branch. 50 U. Chi. L. Rev. at 822, reprinted in 3 Sutherland Stat. Const. at 645 (4th ed. 1984).

Consistent with Judge Posner's comments and Judge Keeton's proposed analysis, this Court has held in another case where the plain meaning rule initially appeared to be controlling that the "rule" was, nonetheless, inappropriate:[24]

> But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry [citations omitted]. This is because the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." [Citation omitted]. The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.

Watt v. Alaska, 451 U.S. at 266; see also id. n.9. Thus, while the language of a statute is obviously a good beginning to its construction,

24 Likewise, the unreasonable, limited construction of Acts of Congress is totally inconsistent with the twentieth century development of administrative law in which the courts have universally recognized the need for detailed administrative regulations and deference to administrative interpretations to "flesh out" and implement Congress' policies. See Atkins v. Rivera, 477 U.S. 154, 162 (1986). If the federal courts sanction such approaches to statutory interpretation by administrative agencies, it is inconsistent not to permit a broad approach when courts, in the first instance, are called upon to interpret statutes in order to establish their outer limits -- a task better suited to courts than to administrative agencies.

the statutory language should not be the automatic conclusion of the inquiry.

In summary, recourse to the plain meaning rule in this case is wrong because it does not comport with the duty of courts to interpret statutes so as to implement completely the policies adopted by Congress. The historical facts and context out of which § 1988's fee provision grew persuasively support the conclusion that expert fees are encompassed within the term "reasonable attorneys' fee." Any other conclusion effectively eviscerates the policy of encouraging vigorous private enforcement of federal law, and, thus, this Court under the guise of "plain meaning" would alter national policy by stifling it despite Congress' broad, remedial intent. Consequently, 42 U.S.C. § 1988 must be construed to encompass fee awards for the expense of experts.

II.
This Court Has Already Held That 42 U.S.C. § 1988's Proper Interpretation May Not Be Limited To Its "Plain" Language.

In 1989, this Court decided that a fee award under 42 U.S.C. § 1988 does embrace the expenses of paralegal personnel. Missouri v. Jenkins, 491 U.S. ___, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989). Fundamental to that decision was this Court's rejection of the argument that the "plain meaning" of the statute limited § 1988 to fees personally generated by attorneys. 109 S. Ct. at 2470, 105 L. Ed. 2d at 241. Any argument predicated upon the "plain meaning" rule of statutory construction must, therefore, be rejected in this case.

A primary reason for this Court's refusal to apply the plain meaning rule in Missouri v. Jenkins was the lack of any basis for discriminating between work performed by paralegals and work performed by attorneys under a policy of encouraging private enforcement actions. Id. It simply is irrational to pay one and not to pay the other. It is equally nonsensical to discriminate between

attorneys and experts under the same policy. Friedrich v. City of Chicago, 888 F.2d at 518.

That is particularly true when it is remembered that litigation can more often be successful without paralegals than it can be without experts. While both paralegals and experts prepare and educate counsel, only the latter is truly indispensable. Indeed, the services typically performed by paralegals could be personally performed by the attorney himself, albeit in a much less cost-efficient manner. In contrast, the attorney commonly cannot perform the services of experts.

In this case, for example, the educational and experiential background of WVUH's experts could not be reasonably or economically duplicated by counsel. See Joint App. 50-62, 68-72, 79-86, 93-103 (Pl. Ex. 57; R. 305), 104-111 (Pl. Ex. 58; R 431, 446-47). Moreover, even if an attorney were to educate himself to the level of an expert in non-legal field, he could not take the stand to testify on his clients' behalf. Thus, it would be ironic that courts could award paralegal fees in order to encourage private enforcement actions but could not do so with the far more necessary expert. Such discrimination would be illogical and would contradict Congress' policy.

Remembering the Congressional policy of making whole prevailing parties who have undertaken the enormous expense of enforcing federal law, the payment of experts' fees is fully consistent with the payment of attorneys' fees and paralegals' fees. The bulk of an expert's time and, therefore, of the fees he generates, is devoted to

pretrial preparation of the attorney and of the case.[25] Such a role is, therefore, at least the functional equivalent of a paralegal's role. The fact is that the work of the attorney must be combined with the complementary and supplementary work of both paralegals and experts for there even to be a prevailing plaintiff in many cases.

Consistent with the purpose of 42 U.S.C. § 1988 to foster private enforcement actions, this Court has held that:

> the term [attorney's fee] must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit.

Missouri v. Jenkins, 109 S. Ct. at 2470, 105 L. Ed. 2d at 241 (emphasis added). This statement makes clear that the proper analysis focuses upon the totality of expenses and efforts necessary to achieve success in the litigation. This Court has held that an attorney's "work product" -- an "intensely practical" doctrine -- includes the work of various "agents" who help prepare the case. United States v. Nobles, 422 U.S. 225, 238 (1975).

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25 WVUH also submits that at trial the experts do not merely appear in the morning when the court convenes and then disappear into the night when the court recesses. After a day of trial, experts and attorneys invariably must consult and prepare for the next day's work before the trial court. In addition, even during a trial, experts do not linger in the hallway reading newspapers and biding their time until they are called; most often, as was true in this case, they attend the trial, critique the examination and evidence as it is presented, and make suggestions to counsel on cross-examination.

In addition, the Court's analysis in Missouri v. Jenkins is fully consistent with the legislative history of § 1988, which explicitly stated that awards should reimburse prevailing parties "what it costs" to prevail. S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910. Such an analysis admits of no conclusion other than that the fees of experts who are essential to a prevailing party must be reimbursed under 42 U.S.C. § 1988. Any other determination would render this Court's holding in Missouri v. Jenkins illogical and would require its reversal in order to adopt an overly facile "plain meaning" rule. Such a simplistic approach in this case does not honor Congress' policy. WVUH submits that this Court correctly decided Missouri v. Jenkins and that now is the time to correct the erroneous decision by the Third Circuit on the analogous issue of experts' fees.

III.
Crawford Fitting Co. v. J. T. Gibbons, Inc., Does Not Control Fee Awards Under 42 U.S.C. § 1988.

The Third Circuit's decision in this case eliminating experts' fees from the fee award was based exclusively upon its mistaken belief that Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987), controlled. See West Virginia University Hospitals, Inc. v. Casey, 885 F.2d at 34; Pet. App. A-47. Essentially, what the Third Circuit did was to apply a non-§ 1988 decision (Crawford) while refusing to apply a § 1988 precedent (Missouri v. Jenkins). This curious emphasis of inapplicable precedent and de-emphasis of controlling precedent led to the Third Circuit's incorrect conclusion that expert witness fees are not compensable under 42 U.S.C. § 1988.

Crawford concerned only 28 U.S.C. § 1821 and 28 U.S.C. § 1920, statutes of general application, as well as Fed. R. Civ. P. 54. Crawford did not deal with 42 U.S.C. § 1988, save to cite it as an exception to

the general applicability of 28 U.S.C. §§ 1821 and 1920. 482 U.S. at 444; see also id. at 445 (Justice Blackmun concurring), 446 n.1 (Justices Marshall and Brennan dissenting).[26]

In fact, 28 U.S.C. § 1821 does not apply where "otherwise provided by law," see 28 U.S.C. § 1821(a)(1), meaning whenever a statute, like 42 U.S.C. § 1988, is applicable. Consequently, the Third Circuit's misapplication of Crawford and of 28 U.S.C. § 1821 to a fee award under 42 U.S.C. § 1988 is manifest because § 1988 "otherwise" provides.

Moreover, assuming arguendo that Crawford has any applicability, that applicability is limited to attendance at trial. See 28 U.S.C. § 1821(b). Crawford does not apply to pre-trial or post-trial work. See Friedrich v. City of Chicago, 888 F.2d at 515; Denny v. Westfield State College, 880 F.2d 1465, 1472 (1st Cir. 1989).[27] The record in

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26 Many courts, including the District Court below, have recognized that Crawford is inapplicable to awards of expert witness fees under 42 U.S.C. § 1988. E.g., Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230); SapaNajin v. Gunter, 857 F.2d 463, 465 (8th Cir. 1988); Mathis v. Spears, 857 F.2d 749, 758-59 (Fed.Cir. 1988); Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987); Williams v. City of New York, 728 F. Supp. 1067, 1072 (S.D.N.Y. 1990); West Virginia University Hospitals, Inc. v. Casey, No. 86-0955, Pet. App. at C-3 to C-4 (M.D. Pa. Jan 30, 1989), rev'd, 885 F.2d 11 (3d Cir. 1989); Johns v. Whirlpool Corp., Civ. A. No. 86-2003 (D. Kan. Feb. 4, 1988); Black Grievance Committee v. Philadelphia Electric Co., 690 F. Supp. 1393, 1403 (E.D. Pa. 1988); Freeman v. Package Machinery Co., No. 83-0403F (D. Mass. Sept. 2, 1987), aff'd, 865 F.2d 1331, 1347 (1st Cir. 1988); Hillburn v. Commissioner, Connecticut Department of Income Maintenance, 683 F. Supp. 23, 27 (D. Conn. 1987), aff'd mem., 847 F.2d 835 (2d Cir. 1988); United States v. Yonkers Board of Education, 118 F.R.D. 326, 330 (S.D.N.Y. 1987).

27 Post-trial work can be as important as pre-trial work where experts are necessary to evaluate and obtain compliance with the final judgment order. Under the Third Circuit's restrictive approach, a prevailing party would be compelled to finance his experts after trial even though the defendants persist not only in their continuing violation of law but also by refusing to obey the final judgment order.

this case reflects that the vast majority of the experts' work, and, consequently, their fees, related to pre-trial preparation. Joint App. at 110-29. As revealed by the District Court's lengthy opinion, the trial transcript, and the exhibits, the experts obviously had to review numerous materials, analyze and reflect upon the data provided by the defendants, discuss these data and their conclusions with counsel in order to prepare counsel, and respond to numerous issues raised by both counsel and WVUH in order to prove the allegations contained in the complaint. See, e.g., Joint App. at 14-31, 33-48, 62-67, 73-78. (wherein the experts testified as to the materials they reviewed and the tasks they performed to be able to draw their conclusions).

Significantly, the Pennsylvania defendants stipulated that the litigation was "complex" and required the use of well-qualified experts. See Joint App. at 8, 116-17. The District Court obviously agreed, finding the experts' work "essential" to an "understanding of the theories, issues, and facts crucial to the court's analysis and ultimate factual and legal determinations." Pet. App. at C-2. Consequently, the Third Circuit clearly erred by applying Crawford to non-trial work. See Friedrich v. City of Chicago, 888 F.2d at 515; Denny v. Westfield State College, 880 F.2d at 1472.

The Third Circuit's error, however, was made more egregious by its failure to heed Missouri v. Jenkins. WVUH submits that the Third Circuit's brisk dismissal of Missouri v. Jenkins, see Pet. App. at A-47, overlooked the fundamental holding that § 1988 is not limited to fees

---

(continued)
In this case, WVUH has been compelled to monitor and to take appropriate enforcement actions against the Pennsylvania defendants before the District Court. As of April 1, 1990, the Pennsylvania defendants have yet to comply fully with the final judgment order of January 31, 1989 of the District Court.

generated personally by attorneys. Pointing out the direct applicability of Missouri v. Jenkins as a § 1988 case and the inapplicability of Crawford as a non-§ 1988 case, Judge Posner, speaking for the Seventh Circuit, cogently rejected the arguments concerning Crawford. See Friedrich v. City of Chicago, 888 F.2d at 515-16. Rather than apply Crawford to the exclusion of Missouri v. Jenkins, the Seventh Circuit debunked the notion that 42 U.S.C. § 1988 absolutely must list expert witness fees as a specific reimbursable cost.

Alyeska held that the courts did not possess the equitable power to award fees, but Congress restored that power with § 1988. That equitable power prior to Alyeska and after Congress' enactment of § 1988's fee shifting provision never had any relationship to or dependence upon 28 U.S.C. § 1821. As Judge Posner succinctly and accurately describes both events and intentions, the reference in § 1988 to a "reasonable attorney's fee" is:

> the label for a power first asserted, then withheld, and finally restored; it is not an exhaustive description of the power.

Friedrich v. City of Chicago, 888 F.2d at 518 (emphasis added). Thus, Crawford's holding and analysis are simply inapposite to the question presented in this case about 42 U.S.C. § 1988. Therefore, the Third Circuit erred when it reversed the District Court's award of experts' fees.

CONCLUSION

For the foregoing reasons, West Virginia University Hospitals, Inc., prays: (1) for a reversal of the opinion and judgment of the United States Court of Appeals for the Third Circuit concerning the award of expert witness fees; (2) for reinstatement of the District Court's award of expert witness fees; and (3) for an order directing the Court of Appeals to recalculate its award of attorneys' fees to West Virginia University Hospitals, Inc., to include compensation for time spent on the expert witness fees issue before that court. West Virginia

University Hospitals, Inc., further prays for an award of reasonable attorneys' fees and costs attendant to this appeal.

Respectfully submitted,

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No. 89-994 (7)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WEST VIRGINIA UNIVERSITY HOSPTIALS, INC.,
Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

MAY AN AWARD OF "REASONABLE ATTORNEY'S FEES" UNDER 42 U.S.C. § 1988 INCLUDE COMPENSATION FOR EXPERT WITNESSES?

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No. 89-994

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

JURISDICTION

The Court of Appeals' decision was issued on September 5, 1989. The Court of Appeals denied petitioner's

timely request for a rehearing by order issued October 5, 1989. The petition for certiorari was filed on December 22, 1989 and was granted on February 26, 1990.

Jurisdiction of the Court is pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1988. Proceedings in Vindication of Civil Rights Attorney's Fees

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so for as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to the govern the said courts in the trial and

disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

28 U.S.C. § 1920. Taxation of Costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshall;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title;

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1821. Per Diem and Mileage Generally; Subsistence

* * * *

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

* * * *

STATEMENT OF THE CASE

Congress, in 28 U.S.C. §§ 1920 and 1821, has provided that the prevailing party in a civil action may recover, as part of its costs, witness fees up to $30 per day. The issue in this case is whether Congress intended to change this rule when it provided that the prevailing party in a civil rights action may recover, as part of its costs, "a reasonable attorney's fee." 42 U.S.C. § 1988.[1] Petitioner contends that it is entitled to recover, under 42 U.S.C. § 1988, fees billed by expert witnesses who assisted in the preparation and presentation of the case. The Court of Appeals, relying on the Court's direction in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) concluded that, because expert fees were not mentioned in § 1988, compensation of experts, like other witnesses, was allowed only as costs taxable under 28 U.S.C. §§ 1920 and 1821.

1. In the lawsuit underlying the question before the Court, the petitioner, West Virginia University Hospitals, Inc. (WVUH), prevailed in its challenge that Pennsylvania's system of reimbursing out-of-state providers of Medicaid services, such as petitioner,

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[1]The statute provides, in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. § 1988.

violated federal statutory and constitutional law (42 U.S.C. § 1396a(a)(13)(A) and the Fourteenth Amendment)[2], and secured an award of attorney's fees under 42 U.S.C. § 1988. Pet App. at B-67 and 68. As prevailing party, petitioner claimed $350,000 in attorney's fees, $104,133 attributable to expert witness fees and costs and $45,867 in disbursements. Pet. App. at C-1. Although respondents did not contest that the experts were well qualified and that their fees were reasonable, they did argue that expert witness fees were not available under § 1988.

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[2]The Court of Appeals found it unnecessary to rule on petitioner's successful Fourteenth Amendment Equal Protection claim. Pet. App. at A-37 n. 9.

The District Court disagreed with the respondents. The Court acknowledged that Crawford limits expert fees as costs to thirty dollars per day "'absent contract or explicit authority to the contrary' Crawford, 482 U.S. at 445"; Pet. App. at C-2, and conceded that "[t]his language appears all-encompassing." Pet. App. at C-3. Nevertheless, the District Court concluded that "The fact-specific application of the Crawford decision, coupled with the emphatic statements of three Justices regarding the decision's inapplicability to Section 1988, make departing from accepted practice unattractive." Pet. App. at C-4. The District Court, accordingly, awarded all expert fees claimed.

2. The Court of Appeals reversed, ruling that 42 U.S.C. § 1988 "as presently drafted does not authorize expert fee awards in excess of the statutory cap of thirty dollars per day provided in section 1821(b)." Pet. App. at A-48. The Court of Appeals followed Crawford, stating that it "seems to dictate that, even in the case of a fee shifting statute such as section 1988, a court may not award fees in excess of the statutory maximum of thirty dollars a day unless the fee shifting statute expressly makes such an allowance." Pet. App. at A-46. The appeals court noted the Court's "disfavor for '[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in sections 1920 and

1821 without plain evidence of congressional intent to supersede that section,'" and noted the Court's admonition in Crawford that it "'will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees.'" Pet. App. at A-46.

The Court of Appeals concluded that Missouri v. Jenkins, No. 88-64 (U.S. June 19, 1989), did not alter the holding in Crawford because Jenkins dealt with fees of law clerks and paralegals, which are not regulated by statute as are witness fees. Pet. App. at A-47. Accordingly, "constrained by the language of Crawford", and "defer[ring] to legislative fiat," the Third Circuit "abandon[ed] [its] previous rule" and "limit[ed] expert witness fees to thirty dollars a day." Pet. App. at A-47.

The Court granted certiorari on February 26, 1990.

SUMMARY OF ARGUMENT

By its plain terms, 28 U.S.C. § 1821 permits a prevailing party to recover $30 per day as costs associated with witnesses. The Court in Crawford Fitting Co. v. J.T. Gibbons Inc., 482 U.S. 437 (1987), has applied the limitation to expert witnesses, and has said it will respect the limitations of witness costs in the Fee Act unless a statute or contract explicitly provides otherwise. The "attorney's fees" amendment to 42 U.S.C. § 1988, upon which petitioner relies, does nothing of kind. By its plain terms, it provides only that "reasonable attorney's fees" be allowed to a prevail-

ing plaintiff as part of the costs. There is no mention in the amendment of

costs associated with expert or other witnesses nor is there any mention of expert witness fees in the debates surrounding its passage. Accordingly, 28 U.S.C. § 1821 limits the amount of reimbursement that may be had for expert witness fees because § 1988 does not contain "explicit statutory authority to the contrary." Crawford, 482 U.S. at 439.

Neither the legislative history of the "attorneys fees" amendment to § 1988, the context of its enactment, nor a comparison with other fee shifting statutes suggests that Congress meant "reasonable attorney's fees" to mean more than just that. The amendment was enacted in direct response to the Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), a decision which forbade federal courts to award attorneys

fees as costs, absent statutory authorization. The entire debate concerning the amendment was over whether an attorney's fee award would be manadatory or discretionary and whether different standards would be applied to prevailing plaintiffs as opposed to prevailing plaintiffs. The question of reimbursing the costs of expert witnesses under § 1988 was neither advocated nor debated by Congress while it was debating the feel shifting amendment to § 1988.

In other fee shifting legislation, however, some of it passed about the same time as the amendment to § 1988, Congress made express provision for the shifting of expert fees as well as attorneys fees as a part of recoverable costs. Thus, it appears that Congress understood that expert fees had to be explicitly provided for, it they were to be allowed as costs, and did not assume

that expert fees would automatically be included by the phrase "reasonable attorney's fees."

There is not only no "persuasive evidence", Watt v. Alaska, 451 U.S. 259, 266 (1981), there is no evidence at all that would preclude the application of the plain meaning rule in this case. To read "reasonable attorney's fees" to include expert fees does violence to the plain meaning and wording of the amendment is not necessary to effectuate the statute's purpose. Congress has provided for court appointed experts upon the request of a litigant and for that expert to be paid by the parties in porportion as the court directs and thereafter charged in like manner as other costs. Fed.R. Evid. 706; 28 U.S.C. § 1920(6). Thus, in a properly presented case, the issue of affordability of experts should never arise.

Missouri v. Jenkins, No. 88-64 (U.S., June 19, 1989), does not control because it did not concern reimbursement for expert witnesses but only the rate of reimbursement for paralegals and law clerks who were employees and members of the attorney's staff. Because these employees were not witnesses, 28 U.S.C. § 1821 did not come into play. Crawford, not Jenkins, controls here and requires that the judgment of the Court of Appeals be affirmed.

ARGUMENT

The bare phrase "reasonable attorney's fee" contained in 42 U.S.C. § 1988 cannot be read so expansively as to include fees generated by expert witnesses. To do so would be to distort the plain meaning of the statute, to read into the legislative history more than is there, and to ignore the Court's clear direction in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). In Crawford, the Court held that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set forth in 28 U.S.C. § 1821 and § 1920." Id. at 445. Congress has simply not placed in 42 U.S.C. § 1988 an explicit statutory

authorization for an award of expert witness fees, and the judgment of the Court of Appeals adhering to the limits of 28 U.S.C. §§1821 and 1920 must consequently be affirmed.

A. THE PLAIN STATUTORY LANGUAGE, INTERPRETED IN CRAWFORD, LIMITS EXPERT WITNESS FEES TO THIRTY DOLLARS PER DAY.

The Court has consistently said that in cases of statutory construction that starting point must be the statutory language itself. United States v. Ron Pair Enterprises, Inc., No. 87-1043 (U.S. Feb. 22, 1989); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) "[T]he strong presumption [is] that Congress expresses its intent through the language it chooses." Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1989). Where the language of a statute is clear, only the

"most extraordinary showing of contrary intentions" from the legislative history[3] would justify altering the statute's plain language. Garcia v. United States, 469 U.S. 70, 75 (1984).[4]

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[3]The legislative history of the fee shifting amendment to § 1988 is conveniently collected in the Civil Rights Attorney's Fees Awards Act of 1976 Source Book: Legislative History, Texts, and Other Documents. 94 Cong. 2d. Sess. (1976). (Prepared by the Subcommittee on Constitutional Rights of the Committee of the Judiciary United States Senate and collecting the Senate and House reports and the proceedings and debates of both Houses.)(Available in the Library of Congress.)(Hereinafter referred to as Source Book.)

[4]To the extent petitioner urges the Court to disregard statutory language in favor of general policy considerations, their arguments must be

(FOOTNOTE CONTINUED ON NEXT PAGE)

1. Here, the statutory language is plain. Congress has provided for witness fees as taxable costs in the modern version of the Fee Act of 1853:

> A judge or clerk of any court of the United States may tax as costs the following....
>
> (3) Fees and disbursements for printing and witnesses....

(FOOTNOTE CONTINUED)

rejected. The Court has recently cautioned against ignoring the plain language of a statute on these grounds:

> [W]e decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

Mansell v. Mansell, No. 87-201, slip op. at 13 (U.S. May 30, 1989).

> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

The costs permitted for witnesses, other than court-appointed experts, are further limited by statute:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . should be paid the fees and allowances provided by this section.
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

28 U.S.C. § 1821(a)(1),(b). Rule 54(d) of the Federal Rules of Civil Procedure provides in turn for the taxation of costs in favor of the prevailing party,

"unless the court otherwise directs." Petitioner concedes, as it must, that the "plain meaning" of 42 U.S.C. § 1988 provides only for the shifting of "a reasonable attorney's fee" as part of the costs allowed a successful plaintiff. The statute makes no mention of witness fees. Thus, to the extent costs associated with witnesses are allowed at all, they are limited, except in the case of court appointed experts, to an attendance fee of thirty dollars per day.

2. The Court recently addressed the effect of these two statutes in Crawford. In that case, prevailing plaintiffs sought recovery of fees paid expert witnesses in an antitrust case. The Court rejected the argument that Rule 54(d) allowed the district court discretion to award witness fees in excess of the statutory limits:

> We think that it is clear that in §§ 1920 and 1821, Congress comprehensively addressed the taxation of fees for litigants' witnesses. This conclusion is all the more compelling when we consider that § 1920(6) allows the taxation as a cost of the compensation of court-appointed expert witnesses. There is no provision that sets a limit on the compensation for court-appointed expert witnesses in the way that § 1821 sets a limit for litigants' witnesses. It is therefore clear that when Congress meant to set a limit on fees, it knew how to do so. We think that the inescapable effect of these sections in combination is that a federal court may tax expert witness fees in excess of the $30-per-day limit set out in § 1821 only when the witness is court-appointed.[5]

482 U.S. at 442.

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[5]The Court noted that petitioners' argument had been rejected by the Court years before in Henkel v. Chicago, S.P., M. & O.R. Co., 284 U.S. 444 (1932). 482 U.S. at 443.

The Court observed that its holding in Crawford conforms to its interpretation of the Fee Act in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). In Alyeska, the Court ruled that courts were not empowered to award counsel fees to a prevailing party, because counsel fees were not listed as a cost taxable under the Fee Act. The Court in Crawford recognized that Congress had responded to Alyeska by broadening the availability of attorneys fees under 42 U.S.C. § 1988, but noted that "it has not otherwise 'retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors.'" 482 U.S. at 444, quoting Alyeska, 421 U.S. at 260. The Court went on to say that:

> We think that, as in Alyeska, Congress has made its intent plain in its detailed treatment of witness fees. We will not lightly infer that Congress has repealed §§ 1920 & 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees. As always, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976), quoting Morton v. Mancari, 417 U.S. 535, 550-551 (1974) (emphasis added).

482 U.S. at 444-445.

While it is certainly true that the Court in Crawford did not decide the precise issue now before the Court -- availability of expert fees under 42 U.S.C. § 1988 -- it is also true that the Crawford decision goes a long way toward answering that question. The

Court has acknowledged that the limitations of the Fee Act are generally applicable to expert witnesses and has said in the plainest terms that it will respect those limitations, absent explicit statutory direction to the contrary. Because the language of 42 U.S.C. § 1988 refers only in general terms to the allowance of attorneys fees as costs, and is silent as to witness fees, it does not provide the clear direction the Court has said it will require to modify the Fee Act.

B. CONGRESS DID NOT INTEND WITNESS FEES TO BE COVERED BY 42 U.S.C. § 1988.

Petitioner asks that the Court look beyond the plain language of 42 U.S.C. § 1988, which does not mention expert witness fees, to find a congressional intent that they be included

anyway within the statute's scope. However, the historical context of the enactment of the "attorney's fee" amendment to § 1988, the debate surrounding it, and a comparison with other fee shifting statutes all demonstrate that Congress' attention was focused on shifting the cost of counsel fees in civil rights litigation and not on compensation for expert witnesses.

1. The amendment was passed in direct response to the Court's decision in Alyeska. In that case, the Court held that federal courts could not award attorneys' fees as a cost to prevailing parties unless the award was specifically authorized by statute.

> Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorneys' fees; but neither has it retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted.

421 U.S. at 260 (footnote omitted).

The Court stated that "the approach taken by Congress to [the issue of attorney's fees] has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees...." Alyeska, 421 U.S. at 269. The Court also stated that Congress "has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified in the costs statute." 421 U.S. at 255. The Court further noted that there is "a well-established principle . . . that no 'change is to be presumed unless clearly expressed.'" 421 U.S. at 256, n.29 (citation omitted).

The Court found that Congress has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes . . . [which] differ considerably among themselves.... [And that] it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 260-262.

In response to Alyeska, Congress amended 42 U.S.C. § 1988, to explicitly provide that in certain civil rights cases, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." By its plain terms, the statute addresses only the shifting of attorneys' fees as

part of the costs. The statute is silent as to expert witness' fees despite the fact that the Fee Act of 1853, discussed in Alyeska, contains an explicit limitation on witness fees allowable as costs, and despite the decision of Henkel v. Chicago, S.P., M. & O.R. Co., 284 U.S. 444 (1932), which held that these limitations were fully applicable to costs generated by expert witnesses. Under these circumstances, Congress should not be presumed to have meant more than it said, and "a reasonable attorney's fee" should not be distorted to include expert witness' fees.

2. Petitioner suggests that the phrase "'reasonable attorney's fees' is a 'shorthand expression' for what it reasonably costs to prevail, including expert fees." Pet. Brief at 23. Petitioner draws support for its position

from Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), a case in which the court refused to read either 42 U.S.C. § 1988 or the Crawford decision literally and consequently did conclude that "reasonable attorney's fees" was a shorthand expression which included witness fees. The Friedrich decision misreads Crawford and does not square with Congress' specific treatment of expert fees in other fee shifting statutes -- some enacted or debated at the same time as the amendment to § 1988.[6] For example, about a week

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[6] Petitioner's claim that "Congress specifically state[d] its intent that the term 'reasonable attorneys' fees' when used in fee shifting statutes, includes fees of experts", Pet. brief at 18, is incorrect, misleading and wholly unsupportable from the authority petitioner cites--H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808. That report states:

(FOOTNOTE CONTINUED ON NEXT PAGE)

before it enacted the amendments to § 1988, Congress passed the Toxic Substances Act, Pub.L. 94-469, 90 Stat. 2041, Oct. 11, 1976, 15 U.S.C. § 2601, et seq. That statute provides that "The

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(FOOTNOTE CONTINUED

> The conferees intend that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and reasonable costs of expert witnesses and reasonable costs of any test or evaluation which is found to be necessary . . . as well as the traditional costs incurred in the course of litigating a case.

This statement only applied to the bill under consideration, the Handicapped Children's Protection Act of 1986, P.L. 99-372, 100 Stat. 796, 20 U.S.C. § 1415 (e)(4)(B). The amendments to § 1988 were enacted in October of 1976. What a Congressional Conference committee said about a different statute ten years after it amended § 1988 cannot be taken as an expression of what Congress intended earlier. Firestone Tire and Rubber Co. v. Bruch, No. 87-1054 (U.S. Feb. 21, 1989).

court may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate." 15 U.S.C. § 2619(c)(2), Pub.L. 94-469, § 20.[7] Similarly, Congress enacted in 1980 amendments to the statutory provision for costs and fees taxable in civil actions brought by or against the United States under the Equal Access to Justice Act. 28 U.S.C. § 2412. These amendments were debated at the same time

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[7]Senator Kennedy, one of the principle sponsors of the amendment to § 1988, referred to the Toxic Substances Act and its fee shifting provisions during debate on the amendments to § 1988. Source Book at 198. Senator Tunney, who introduced the amendment to § 1988, was one of the managers, a member of the conference committee and a member of the Commerce Committee (which reported out the Toxic Substance bill) for the Toxic Substances Act. 1976 U.S. Code & Admin. News at 4522 and 4543.

as the amendments to § 1988, and expressly define taxable "reasonable fees and expenses of attorneys" as including "expenses of experts witnesses." 28 U.S.C. § 2412(d)(1)(A), (d)(2)(A).[8] The Clean Air Act, 42 U.S.C. § 7604(d), passed in 1976, authorizes a court to award to any party costs of litigation "including reasonable attorney's fees and expert witness fees." (Emphasis added.) These are not the only examples. In at least 30 provisions in 26 separate statutes, Congress has chosen

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[8]28 U.S.C. § 2412(d) was amended effective October 21, 1980 by the 96th Congress. The Amendment, however, was first proposed by Senator Helms as amendment No. 470 to S.2278, the bill which amended 42 U.S.C. § 1988. Amendment 470 was debated by the Senate during its debate on S.2278 and expresly called for reasonable expenses of witnesses and expert witnesses. Source Book at 34-45.

to specify that under certain statutorily-defined circumstances litigants (often, however, only prevailing plaintiffs) may recover expert witness fees in addition to the costs normally recoverable in a civil action and in addition to attorneys' fees.[9]

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[9]See Administrative Procedure Act, 5 U.S.C. § 504(b)(1)(A); Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2072(a), 2073; Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(1)(C), (d)(3); National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4; Endangered Species Act of 1973; 16 U.S.C. § 1540(g)(4); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a)(1), (b)(2); Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 7430(a), (c)(1)(A)(ii); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d); Federal Water Pollution Control

(FOOTNOTE CONTINUED ON NEXT PAGE)

Thus, it is simply not true that Congress regards the phrase "reasonable attorney's fee" as a term of art that encompasses expert witness costs -- still less is it a shorthand phrase for "all expenses of litigation."

(FOOTNOTE CONTINUED)

Act, 33 U.S.C. § 1365(d); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4); Deepwater Ports Act of 1974, 33 U.S.C. § 1515(d); Act to Prevent Pollution from Ships, 33 U.S.C. § 1910(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act of 1972, 42 U.S.C. § 4911(d); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e); Clean Air Act Amendments of 1977, 42 U.S.C. § 7622(b)(2)(B), (e)(2); Power Plant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e); Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 2014(e).

3. The pre-Alyeska cases cited in the Senate Report on the proposed amendment do not suggest, as petitioner implies, see Pet. brief at 20, that Congress was led to believe an award of attorney's fees would include expert fees. The Senate Report cited Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) as containing the "appropriate standards" for computing counsel fees and Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte Mecklenberg Board of Education, 66 F.R.D. 483 (W.D. N.C. 1975) as cases which "correctly applied" those standards. Senate Report at 6, Source Book at 12. The report stated that "In computing the fee, counsel for the prevailing parties should be paid, as is

traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on the matter.'" Id. These cases were cited to Congress for the purpose of illustrating when an award of attorney's fees should be made and to whom but not for the proposition that experts' costs are to be a component of an attorney's fee.[10]

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[10]None of the 12 factors listed in Johnson has a thing to do with expert's fees. The fact that they were awarded in Davis v. County of Los Angeles, supra, is of little moment because the charge for expert witness fees was not challenged by the defendants and Davis only "permitted a fee award to counsel in a public interest firm which otherwise would have been entitled to no fee." Blanchard v. Bergeron, No. 87-1485, slip op. at 5 (U.S. Feb. 21, 1989). Similarly, in Swann, there was no objection by the defendants to the "expenses" claimed, and awarded.

Congress certainly did recognize that there was a difference between attorney's fees and expert witness' fees, and knew how to provide language specific enough to encompass expert witness' fees when it wanted to. That it did not do so in the amendment to § 1988 can only mean that Congress did not mean for expert's fees to be covered under § 1988. In this amendment, Congress addressed only the problem at hand -- Alyeska -- and provided only provision for the shifting of reasonable attorney's fees.[11] Not only is there no explicit reference in the statute for the shifting of expert witness' fees --

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[11]That Congress was not concerned with expert's fees is borne out by the debates on the amendments, which do not even mention expert costs. Source Book passim.

as required by the Court in Crawford -- there is no explicit reference to expert witness' fees in the legislative history or in the debates, nor is there any other basis for concluding that Congress assumed that expert's fees would be included without specific reference.

4. Petitioner argues that, despite Congress' failure to mention expert witness' fees in § 1988, the intent of the statute will be thwarted if the Court does not read the statute to allow for fees anyway. The argument runs that civil rights plaintiffs will be discouraged from filing lawsuits or will be unable to prosecute them successfully because there will be no mechanism for them to recover expert witness' fees at the conclusion of the litigation, if they are successful. In the first place, it is not for the Court

to rewrite clear statutory language on the basis of broad policy considerations. See Badaracco v. C.I.R., 464 U.S. 386, 398 (1984)("Courts are not authorized to rewrite a statute because they might deem its effect susceptible of improvement."); T.V.A. v. Hill, 437 U.S. 153, 194-195 (1978)("We do not sit as a committee of review, nor are we vested with the power of veto." The Supreme Court may not "pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'") Secondly, giving effect to the statute as written will not necessarily have the effect petitioner claims.

The Fee Act draws a distinction between the thirty dollar a day witness fee authorized by statute, and "compensation" for court appointed experts:

> A judge or clerk of any court of the United States may tax as costs the following .... (6) Compensation of court appointed experts....

28 U.S.C. § 1920.[12]

Rule 706 of the Federal Rules of Evidence permits the trial court, upon request of any party or on its own volition, to issue an order to show cause why expert witnesses should not be appointed, and to invite the parties to submit nominations. Court appointed experts "are entitled to reasonable compensation in whatever sum the court may allow . . . [which] shall be paid by the parties in such proportion . . . as the court directs, and thereafter charged

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[12]Congress obviously used the word "compensation to distinguish this payment from the "witness fee" authorized by § 1920(3) and limited in amount by § 1821.

in like manner as other costs." Fed.R. Evid. 706(b).

Court appointment of a witness nominated by one of the parties can and has been used to establish a statutory basis for later taxation of that witness's compensation as costs. See United States Marshal's Service v. Means, 741 F.2d 1053, 1057-58 (8th Cir. 1984). This is also done, on occasion, under the rubric of the Court's "inherent power" to tax expert witness fees through prior approval. See Gradmann & Holler GMBH v. Continental Lines, S.A., 679 F.2d 272, 274-75 (1st Cir. 1982); Cagle v. Cox, 87 F.R.D. 467, 471-72 (E.D. Va. 1980); Pizzarro-de Ramirex v. Grecomar Shipping Agency, 82 F.R.D. 327 (D.P.R. 1976). See also 11 Moore's Federal Practice § 706.01[3.-1]

p.VII-78 ("The inherent power of a trial judge to appoint an expert of this own choosing is virtually unquestioned.")

Taken together, Rule 706 and 28 U.S.C. § 1920(6) provide a vehicle for a needy plaintiff to apply to the court for appointment of an expert and for the shifting of the cost of a court appointed expert to the losing party. This fore-closes petitioner's argument that worthy and impecunious litigants will be denied access to necessary experts unless § 1988 is given the expansive reading they suggest. Reading the statutes literally, experts will be available when needed, but the court will be able to evaluate whether their services are necessary and will be in a postion to control their use.

C. MISSOURI v. JENKINS DOES NOT SUPPORT THE PETITIONER

Petitioner argues that the Court's recent decision in Missouri v. Jenkins, No. 88-64 (U.S. June 19, 1989) controls and requires reversal. Petitioner is wrong. In Jenkins, the Court considered the appropriate rate to be applied under 42 U.S.C. § 1988 to work done by paralegals and law clerks employed by counsel. The parties had agreed that they could be compensated under the statute and disagreed only on whether they should be compensated at cost to the law firm or at the hourly rate billed the client. In concluding that the hourly billing rate was appropriate, the Court said that a reasonable attorney's fee "must take into account the work not only of attorneys, but also

of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit." slip op. at 11. The Court in Jenkins did no more than to allow a lawyer to bill an adversary under § 1988 for the services of the lawyer's employees which would normally be billed separately to a private client. This is a far cry from the result urged here. It is one thing to say that the phrase "reasonable attorney's fee" may include compensation for a lawyer's paralegal employees and quite another to say that it may include compensation for non-legal witnesses, not affiliated with the lawyer, whose costs are governed by

another, more specific statute.[13] To give the words of § 1988 so expansive a meaning is to give them no meaning at all.

It is Crawford, not Jenkins, that controls this case. Applying Crawford, expert witness' fees may be taxed as costs only in accordance with the limitations of 28 U.S.C. §§ 1920 & 1821 unless some other statute or contract, explicitly referring to witness fees, provides otherwise. Section 1988 makes no provision for the

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[13]Courts have recognized, in addition, that the purpose of expert testimony is not to advocate, but to assist the fact finder in deciding issues of fact. See, e.g., United States v. R.J. Reynolds Tobacco Co., 416 F.Supp. 313, 315 (D.N.J. 1976); United States v. 364.82 Acres of Land, 38 F.R.D. 411, 416 (N.D. Cal. 1965).

compensation of expert witnesses, and the judgment of the Court of Appeals should therefore be affirmed.

Supreme Court, U.S.
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No. 89-994

IN THE

Supreme Court of the United States

October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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RULE 29.1 LISTING

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ARGUMENT

I.
42 U.S.C. § 1988 Must Be Construed To Give Full Effect To Congress' Purpose Of Encouraging Private Enforcement Actions Under The Civil Rights Statutes By Authorizing Fully Compensatory Fee Awards.

Seizing upon the fact that 42 U.S.C. § 1988 does not contain the words "experts' fees," the Pennsylvania defendants argue that experts'

fees may not be included in awards made under § 1988. However, such a result is contrary to Congress' intent to provide a full and complete remedy that pays what it costs to bring a civil rights enforcement action. Because the Pennsylvania defendants studiously avoid any explanation of how the exclusion of experts' fees is consistent with Congress' purpose in enacting the fee shifting provision of § 1988, West Virginia University Hospitals, Inc. (hereinafter referred to as "WVUH"), respectfully submits that each of the Pennsylvania defendants' arguments should be rejected.

A. The Language Of 42 U.S.C. § 1988 Does Embrace Awards Of Fees For Experts.

The Pennsylvania defendants repeatedly argue that the plain meaning of 42 U.S.C. § 1988 does not countenance awards of fees for experts. See, e.g., Brief of Respondents at 18. They are wrong.

The phrase "reasonable attorney's fee" is a term of art that is well understood by legislators and civil rights litigators to encompass experts' fees, paralegals' fees, and other fees beyond those generated personally by an attorney. See H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 ("The conferees intend that the term 'attorneys' fees as part of the costs' [in 20 U.S.C. § 1415(e)(4)(B)] include reasonable expenses and fees of expert witnesses . . . ."); see also Missouri v. Jenkins, 491 U.S. ___, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989) (paralegals' fees are compensable under § 1988). Indeed, when Representative Drinan, who sponsored the Civil Rights Attorney's Fees Awards Act, discussed the bill, he clearly indicated that the phrase "reasonable attorney's fee" went beyond fees generated by attorneys themselves: "the phrase 'attorney's fee' would include . . . . all incidental and necessary expenses incurred in furnishing effective and competent representation." 122 Cong. Rec. 35,123 (1976) (emphasis added). Further evidence of Congress' intent to allow reimbursement of experts' fees under § 1988 can be found in the express endorsement of pre-Alyeska caselaw awarding experts' fees under similarly-worded civil rights fee shifting statutes. See, e.g., S. Rep. No. 1011, 94th

Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 5911, 5913 (citing Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974)). Thus, 42 U.S.C. § 1988 not only can be read to include awards of experts' fees,[1] it should be so read because it contains fee shifting language that has an established meaning encompassing awards of experts' fees.

B. Congress' Clear Intention Takes Precedence Over The Plain Language Of A Statute.

Even if the phrase "reasonable attorney's fee" were not a term of art, the plain words of the statute would not take precedence over Congress' clear legislative intention. This Court has repeatedly reaffirmed the vitality of this principle. E.g., Green v. Bock Laundry Machine Co., 490 U.S. ___, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); Pennington v. Coxe, 6 U.S. (2 Cranch) 33 (1804).

Although § 1988 does not contain the words "experts' fees," this narrow focus of literality does not adequately illuminate the controlling issue of Congress' intent. In the case of § 1988, three facts underlying the legislation irrefutably demonstrate that Congress intended a broader form of fee relief than that advocated by the Pennsylvania defendants.

First, prior to the announcement of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), federal courts commonly awarded experts' fees when they awarded attorneys' fees pursuant to their then-presumed equitable powers. See Brief of Petitioner at 18 n.15 (citation of pre-Alyeska cases where courts awarded experts'

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1 Nothing in § 1988 prohibits experts' fee awards or is inherently antithetical to them.

fees). This Court has recognized that the historical prelude to the enactment of a statute is a critical factor to consider in interpreting the statute. See, e.g., Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963); Church of the Holy Trinity, 143 U.S. at 462-63.

Secondly, after Alyeska's announcement, Congress acted quickly and decisively to abrogate Alyeska's effects upon civil rights litigation. Concerned with "effective access to the judicial process," H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976), Congress wanted, in particular, to insure that civil rights litigants "have the means to go to court, and to be effective once they get there." 122 Cong. Rec. 33,313 (1976) (statement of Sen. Tunney). Congress clearly recognized that, "[i]f the cost of private enforcement actions becomes too great, there will be no private enforcement." S. Rep. No. 1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5913. These and other indications of Congress' intent establish that Congress wanted to restore to the courts their pre-Alyeska practices, which included expert fee awards as a part of awards of attorneys' fees. Congress wanted to "remedy [the] anomalous gaps in our civil rights laws created by . . . Alyeska." Id. at 1, reprinted in 1976 U.S. Code Cong. & Admin. News at 5909.[2] Nothing in Congress' enactment of § 1988's fee shifting provision suggests that it intended only a partial nullification of Alyeska in the area of the civil rights litigation.[3]

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2 Reinstatement of the federal courts' pre-Alyeska practices by eliminating the "anomalous gaps" is consistent with not only an intent to overturn Alyeska but also Congress' historical practice of supplying broad civil rights remedies. Indeed, WVUH submits that this conclusion is far more reasonable than the one advanced by the Pennsylvania defendants, who argue that Congress did not fill in all of the anomalous gaps despite its stated intentions to do so. Congress did not act in a piecemeal fashion contrary to its stated goals, but rather it acted to eliminate all of Alyeska's effects upon civil rights litigation.

3 Congress' speed in enacting the fee shifting provision of 42 U.S.C. § 1988 is noteworthy and supports the conclusion that Congress perceived a substantial need to overturn Alyeska in its entirety in the area of civil rights litigation. Several legislators and witnesses remarked upon the need for expeditious action

Thirdly, a failure to pay experts' fees is fundamentally contrary to Congress' articulated purpose of creating a "full and complete" remedy that would pay "what it costs" to bring private enforcement actions. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976); S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910. In fact, the Pennsylvania defendants' narrow construction of § 1988 frustrates Congress' purpose because it would deny a successful civil rights plaintiff reasonable compensation for experts needed to prove the plaintiff's case, i.e., "what it costs" to prevail. "Plain meaning" is only an axiom of construction, not a rule of law, see Watt v. Alaska, 451 U.S. 259, 266 (1981), and it should not be allowed to become an ultimate weapon of statutory destruction.

In appropriate cases like this one, this Court has rejected "plain meaning" constructions, agreeing with Judge Learned Hand that:

> "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Public Citizen v. United States Department of Justice, 491 U.S. ___, 109 S. Ct. 2558, 2566, 105 L. Ed. 2d 377, 392 (1989) (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)).

(continued)

by Congress. This backdrop of urgency to § 1988's amendment and the concomitant lack of dispute or legislative compromise are consistent with the observation that Congress was not acting with precision on a number of finite issues affected by Alyeska but rather was striving to return as quickly as possible to the pre-Alyeska status quo, which did, in fact, include awards of experts' fees. See Brief of Petitioner at 18 n.15.

Indeed, this Court has already rejected a literal construction of § 1988, Missouri v. Jenkins, and has a long tradition of rejecting plain meaning constructions in the civil rights area when the historical context of civil rights statutes indicated that Congress did not intend a literal reading. See, e.g., Hensley v. Eckerhardt, 461 U.S. 424, 429 n.2 (1983); Briscoe v. Lahue, 460 U.S. 325 (1983); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Consistent with these authorities, the Seventh Circuit concluded that § 1988 authorized awards of experts' fees. Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230).

Because statutes are "purposive utterances" and because "language is a slippery medium in which to encode the purpose," id., courts must read the statute to bring about the end the Congress would have specified had Congress "thought about it more clearly or used a more perspicuous form of words."[4] Id.; see Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) ("It is a commonplace that courts will further legislative goals by filling the interstitial silences within a statute or a regulation. Because legislators cannot foresee all eventualities, judges must decide unanticipated cases by extrapolating from related statutes or administrative provisions."); see also 2A Sutherland Stat. Const. § 45.09 at 41 (4th ed. 1984) (Judge Robert E. Keeton's four-step analysis of statutory construction). As Judge Posner noted, this is not judicial usurpation but "interpretation in a sense that has been orthodox since Aristotle." 888 F.2d at 514.

Accordingly, while, in hindsight, one might criticize Congress for its failure to use a "more perspicuous form of words," id., that criticism does not justify restricting § 1988's reach in contradiction of Congress' purpose. To restrain § 1988 is to reduce Congress' power to legislate effectively. That is not this Court's function; instead this Court should aid in the achievement of Congress' goals.

C. Congress' Explicit Inclusion Of Experts' Fees In Other Statutes Does Not Compel The Conclusion That Experts' Fees Are Not Compensable Under 42 U.S.C. § 1988.

The Pennsylvania defendants correctly point out that, in a number of other fee shifting statutes, Congress explicitly authorized experts' fees. See Brief of Respondents at 35-36 and n.9. Thus, they argue that Congress must have intended to exclude awards of experts' fees when it enacted § 1988 without any explicit reference to such fees.

The Pennsylvania defendants' argument rests entirely on the proposition that Congress will always use the term "experts' fees" when it intends such fees to be compensable. This proposition, however, is untenable. Congress has made it clear in other fee shifting statutes that it intends the term "reasonable attorneys' fees" to include experts' fees. H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 (concerning 20 U.S.C. § 1415(e)(4)(B)). Therefore, Congress' failure to use the words "experts' fees" by no means constitutes an exclusion of such fees.

Furthermore, this Court has held that omission of particular words in a fee shifting statute may not be a basis for thwarting Congress' purpose. In Pennsylvania v. Delaware Valley Citizens' Council for

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4 The Pennsylvania defendants mistakenly state that experts' fees were not mentioned in the legislative history of § 1988's fee shifting provision. See Brief of Respondents at 41. Some witnesses did refer to compensation of experts. E.g., Awarding of Attorney's Fees: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 1, 89 (1975) (prepared statement of M.F. Derfner, stating in support of awards of attorney's fees that "because of the limited resources available to [attorneys] in public interest cases, they are rarely able to afford the technical assistance of expert witnesses"). However, Congress apparently saw no reason to be more explicit, presumably because the term "reasonable attorney's fee" was a term of art with an established meaning encompassing experts' fees. See id. at 91 n.9 (antidiscrimination fee shifting provisions normally contain identical language); see also Section I.A. supra. WVUH is aware of no expression of Congressional intent to prohibit the compensation of experts' fees under § 1988.

Clean Air, 478 U.S. 546 (1986), the Court confronted the issue of whether the expenses of administrative proceedings were embraced by the fee shifting provisions of the Clean Air Act, 42 U.S.C. § 7604(d).

The Commonwealth of Pennsylvania, in arguing for a limited construction of § 7604(d), contrasted that statute's "costs of litigation (including reasonable attorney and expert witness fees)" in "any action" to § 1988's authorization for a "reasonable attorney's fee" in "any action or proceeding." Pennsylvania argued that the omission of the word "proceeding" from § 7604(d) was important and signified that Congress did not intend the Clean Air Act's fee shifting provision to be as broad as § 1988's remedy.

The Court refused to attach such significance to the minor differences in terminology between the two statutes. Instead, the Court concluded that Congress' purposes behind both § 1988 and § 7604(d) were "nearly identical, which lends credence to the idea that they should be interpreted in a similar manner," irrespective of their distinctions in drafting. 478 U.S. at 559. In reaching this conclusion, the Court noted § 1988's purpose of fostering private enforcement actions. Id. at 560. Importantly, after finding that the Clean Air Act's fee shifting provision had a nearly identical purpose, the Court's analysis turned upon the fact that participation in administrative proceedings was "crucial" to the vindication of the rights of environmental groups, id. at 561, and "necessary to the attainment of adequate relief." Id. at 558.

The same analysis is appropriate within the context of § 1988 and experts' fees. Just as the absence of an explicit reference to a "proceeding" does not control the proper interpretation of § 7604(d), the absence of an explicit reference to "experts' fees" in § 1988 should not control the proper interpretation of § 1988. Indeed, as a broader statutory remedy in a more important substantive area of the law, § 1988 logically must include compensation for the experts' fees expressly embraced by § 7604(d).

The district court in this case found WVUH's experts to be "essential" to the district court's decision.[5] See Pet. App. at C-2. Such a finding of indispensability is consistent with the holding in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air that costs "crucial" to the enforcement of the Clean Air Act are compensable under the Clean Air Act's similarly-worded fee shifting provision. Therefore, as stated by this Court, both § 1988 and § 7604(d) "should be interpreted in a similar manner," 478 U.S. at 559, which means that the costs of WVUH's "essential" experts should be reimbursed.

In a similar vein, Sullivan v. Hudson, 490 U.S. ___, 109 S. Ct. 2248, 104 L. Ed. 2d 941 (1989), rejected a plain meaning construction of the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (hereinafter referred to as the "EAJA"). That case dealt with whether the costs of administrative proceedings under the Social Security Act were compensable under the EAJA. The Federal Government argued that they were not because the EAJA was limited to a "civil action" which excludes any non-judicial forum. 109 S. Ct. at 2257, 104 L. Ed. 2d at 954.

Again, the basis for the Court's rejection of a "plain meaning" construction of the EAJA was the conclusion that administrative proceedings were "crucial" to the vindication of the rights to be enforced. Id., 109 S. Ct. at 2256, 104 L. Ed. 2d at 953. The Court analyzed the situation by pointing out that the failure to pay for a "crucial" part of an enforcement action would be "anomalous" and

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5 Prior to its decision in this case, the Third Circuit had held that experts' fees were compensable under § 1988 if the court concluded the experts were indispensable to the case. See Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201, 204-06 (3d Cir. 1981).

would frustrate the EAJA's purpose. In an apt analogy, the Court characterized the effects of a plain meaning construction of the EAJA as a "lifeline that . . . was a foot short." Id., 109 S. Ct. at 2256, 104 L. Ed. 2d at 954. The same can be said with respect to the Pennsylvania defendants' construction of § 1988.

Although the Pennsylvania defendants rely heavily upon the EAJA because it explicitly authorizes experts' fees, see Brief of Respondents at 34-35, the EAJA is, in actuality, more evidence of the breadth of § 1988's remedy. In enacting the EAJA, Congress clearly intended that the EAJA would be more limited in its awards than § 1988. The legislative history noted that the EAJA would not control where other fee shifting statutes were applicable. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4997. Specifically, the House Report stated that the EAJA was not intended to replace or supersede any statute like § 1988 "in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing [§ 1988]." Id. That fact is reflected in 28 U.S.C. § 2412(d)(1)(A)'s initial language "[e]xcept as otherwise specifically provided by statute . . . ." Thus, Congress clearly contemplated situations where both the EAJA and other fee shifting statutes like § 1988 might be applicable, and it provided that § 1988 would take precedence in that event.

The precedence of § 1988 over the EAJA makes sense because the EAJA is a limited remedy. For example, a party must not only prevail, but he must also show that the position of the United States was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A). In addition, fees for attorneys and for experts are capped (albeit by different methods). 28 U.S.C. § 2412(d)(2)(A). Moreover, prevailing parties who have resources over $2,000,000.00 do not qualify for a fee award under the EAJA. 28 U.S.C. § 2412(d)(2)(B).

While Congress intended to foster enforcement actions with the EAJA, it is clear that its intent was not to provide fees for every prevailing party or to pay all of the fees charged to a prevailing party by his attorneys or experts. In short, the EAJA does not provide for a

"full and complete" remedy as does § 1988.[6] Thus, Congress' express inclusion of experts' fees in the EAJA cannot be read to exclude experts' fees from § 1988, the broader statute.[7]

Consequently, the sweeping proposition of statutory construction advanced by the Pennsylvania defendants must be rejected. It is inaccurate to say that Congress' inclusion of explicit provisions concerning experts' fees in one fee shifting statute, even one with a similar purpose, automatically excludes them in another fee shifting statute that does not contain the same degree of explicitness. Therefore, the Pennsylvania defendants' argument about Congress' express inclusion of experts' fees in twenty-six statutes is not a valid basis for a construction of § 1988 that excludes compensation for experts' fees. Instead, § 1988 should be interpreted in light of its stated purpose of providing a "full and complete" remedy to pay "what it costs" to enforce civil rights.

D. Any Construction Of 42 U.S.C. § 1988 Must Avoid An Absurd Or Anomalous Result.

The Pennsylvania defendants' construction of § 1988 not only frustrates Congress' manifest purpose but produces an "odd result" which demands a more reasonable construction. Green v. Bock

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6 Indeed the legislative history of the EAJA suggests that Congress' motive in enacting the EAJA was to discourage government agencies from persisting in non-meritorious litigation, which is a far different intention than the one behind § 1988. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9-10, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4988-89.

7 Another interesting contrast between the EAJA and § 1988 is their respective lengths. The EAJA is far more lengthy than is § 1988's fee shifting provision and provides far more detail. Congress obviously wished to achieve only certain limited goals in the EAJA, which, therefore, required more precise drafting than is found in § 1988. Again, this difference supports WVUH's contention that Congress acted broadly in § 1988 and that "reasonable attorney's fee" is a form of shorthand for what it costs to prevail.

Laundry Machine Co., 109 S. Ct. at 1984, 104 L. Ed. 2d at 564; see also id., 109 S. Ct. at 1994, 104 L. Ed. 2d. at 575 (Scalia, J., concurring).

The Pennsylvania defendants contend that experts' fees may be awarded only pursuant to those statutes in which Congress specifically recites the phrase "expert witness fees." E.g., 15 U.S.C. § 2805(d)(1)(C) (Petroleum Marketing Practices Act). Thus, under the Pennsylvania defendants' interpretation of the various federal fee shifting statutes, experts' fees may be compensated in the case of some statutory violations but never in the case of a constitutional violation, such as the Fourteenth Amendment violation found by the district court in this case. See Pet. App. at B-49 to B-53. Such a construction turns logic and reason inside out by making a constitutional violation less worthy of vindication than a statutory violation. While federal statutes typically involve important national policies, they do not rise to the level of our basic constitutional rights. Therefore, a broad construction of § 1988, a civil rights fee shifting statute, is in order.

In certain respects, the odd result advocated by the Pennsylvania defendants is analogous to the example of an absurd law, noted by three members of this Court in another case. That absurd law prohibited the drawing of blood in the streets by a physician who comes to the aid of an injured person. Public Citizen v. United States Department of Justice, 109 S. Ct. at 2574-75, 105 L. Ed. 2d at 402 (Kennedy, J., Rehnquist, C.J., and O'Connor, J., concurring). In the context of § 1988, the injured person can clearly have his attorney assist him with his lawsuit, but to what avail if an expert, who is vital to the proof of his case, cannot assist him? Thus, just as an injured man may lose his life in the street because a physician cannot come to his aid with necessary treatment, the civil rights plaintiff may lose his case because an expert cannot provide necessary advice and/or testimony.

To avoid this absurdity and to honor Congress' intent and, indeed, its long tradition of broad remedies in the civil rights area, the arguments advanced by the Pennsylvania defendants about § 1988's

"plain meaning" must be rejected. If the Pennsylvania defendants eschew "snippets" of legislative history, then they should at least be willing to recognize the sequence of events leading to the enactment of the fee shifting provision of § 1988: (1) pre-Alyeska practice included awards of experts' fees; (2) Alyeska stopped the practice; and (3) Congress, intending a "full and complete" remedy, quickly restored the pre-Alyeska practice by amending § 1988. Thus, when Congress enacted § 1988's fee shifting provision, it painted with the broad brush of a house painter, not with the fine palette brush of a portraitist. Accordingly, this Court should continue interpreting § 1988 in a manner consistent with its purpose. See Missouri v. Jenkins.

II.
Federal Rule of Evidence 706 Is Not A Substitute For A Full And Complete Fee Award Under 42 U.S.C. § 1988.

The Pennsylvania defendants recognize that the Third Circuit's opinion concerning experts' fees harms and deters civil rights litigants by denying them a full and complete remedy, i.e., one that includes reimbursement for experts. To mitigate this mischief they argue that experts can be appointed by the court under Fed. R. Evid. 706, at least where there are "worthy and impecunious litigants," and that the court can assess the experts' fees against the other party. See Brief of Respondents at 45. This argument is not valid.

First, the protection of civil rights is not within the exclusive province of either the rich or the poor. The entire history of the enforcement of civil rights demonstrates that any person, regardless of his fortune, has the right to enforce his rights and to obtain the relief to which he is entitled. The vindication of civil rights by either a rich man or a poor man benefits both; each is entitled to a full and complete remedy. Therefore, the Pennsylvania defendants' argument that Fed.

R. Evid. 706 is a remedy for at least the "worthy and impecunious" litigant misses the high mark of civil rights enforcement.[8]

The courts have recognized that Fed. R. Evid. 706 is not the panacea suggested by the Pennsylvania defendants. Experts appointed by a court pursuant to Fed. R. Evid. 706 are by no means the functional equivalent of experts selected by a party. See Kaufman v. Edelstein, 539 F.2d 811, 818 (2d Cir. 1976) ("The situation of the court appointed expert . . . differs utterly from that of an expert called by a party . . . ."). Fed. R. Evid. 706 experts are appointed when the court needs assistance comprehending complex and/or technical issues central to the dispute.[9] See, e.g., Students of California School for the Blind v. Honig, 736 F.2d 538, 549 (9th Cir. 1984), vacated on other grounds, 471 U.S. 148 (1985); Gates v. United States, 707 F.2d 1141, 1144 (10th Cir. 1983).

Fed. R. Evid. 706 is a Sword of Damocles that the court may employ to ensure that the parties' experts remain accurate in their testimony:

> The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

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8 WVUH is also concerned with the suggestion that an indigent litigant must also be "worthy." The concept of the "worthy poor" was rejected as a matter of national policy many years ago as one that is fundamentally unfair. See King v. Smith, 392 U.S. 309, 320 (1968). If the Pennsylvania defendants are seriously suggesting a return to that concept, then that is but another basis for rejecting their argument about Fed. R. Evid. 706.

9 The intention to use court-appointed experts to assist the factfinder with complex issues is reflected by the citations to Scott v. Spanjer Brothers, Inc., 298 F.2d 928 (2d Cir. 1962), and to Danville Tobacco Association v. Bryant-Buckner Associates, Inc., 333 F.2d 202 (4th Cir. 1964), in Fed. R. Evid. 706 advisory committee's note.

Fed. R. Evid. 706 advisory committee's note. Thus, experts are appointed only rarely under Fed. R. Evid. 706 in order to provide the court with some assurance of impartiality. See United States v. Green, 544 F.2d 138, 145 (3d Cir. 1976), cert. denied, 430 U.S. 910 (1977); Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981). Nothing in Fed. R. Evid. 706 suggests that courts may routinely use Fed. R. Evid. 706 to appoint experts for civil rights litigation.

Indeed, in United States Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984), a case cited by the Pennsylvania defendants, the court made clear that Fed. R. Evid. 706 is invoked only under "compelling" circumstances. Id. at 1059; accord Fed. R. Evid. 706 advisory committee's note ("actual appointment [of court-appointed experts] is a relatively infrequent occurrence").[10] Again, vigorous civil rights enforcement is not intended only for the indigent. Thus, Fed. R. Evid. 706 is not a soothing balm to the injury caused by the Third Circuit's limited construction of § 1988 in this case.

Furthermore, reliance on Fed. R. Evid. 706 does not address the need for pretrial access to experts. Under the Pennsylvania defendants' argument, a worthy and impecunious person seeking to vindicate his rights must first file suit before he can obtain the services of an expert. Thus, ill-prepared lawsuits must be brought to get needed access to experts. Badly prepared lawsuits merely expend the resources of the courts and litigants needlessly, and, more importantly, they do not facilitate a just resolution of the dispute.

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10 While Fed. R. Evid. 706 is intended to be invoked only rarely, the amicus in support of the respondents concedes that "litigation under the various discrimination and civil rights statutes . . . often involve[s] expensive statistical analyses by experts." Brief Of Amicus Curiae The Equal Employment Advisory Council at 7. Experts, therefore, are regularly crucial to private enforcement actions. Fed. R. Evid. 706 was not designed to bear this type of burden as a routine part of litigation.

Lastly, the Pennsylvania defendants state that court appointment of experts may be accomplished "under the rubric of the Court's 'inherent power' to tax expert witness fees through prior approval." Brief of Respondents at 44. This statement implies that a civil rights litigant is not truly disadvantaged by the Third Circuit's ruling in this case because, after all, he can apply to the court's inherent discretion.

The Pennsylvania defendants may not in one breath rely upon Alyeska and Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987), as limitations on the courts' inherent authority, and then in another breath assert that civil rights litigants will not be harmed because the courts still possess sufficient authority to tax the costs of experts. If this argument about inherent authority is correct, then WVUH submits that the district court in this case has already awarded experts' fees, and the Third Circuit erred in doing anything more than reviewing the district court's decision for an abuse of discretion.

III.

An Extension Of Crawford Fitting Co. v. J. T. Gibbons, Inc., *Is Not Warranted Because It Would Contradict Congress' Intent.*

The Pennsylvania defendants urge the Court to extend Crawford Fitting Co. v. J. T. Gibbons, Inc., to expert fee awards under § 1988. By contrast, they also urge the Court to find Missouri v. Jenkins inapplicable. Thus, the Pennsylvania defendants argue that a non-§ 1988 case ought to control and a § 1988 case ought not to control. This argument is unpersuasive.

Crawford concerned two statutes of general application to litigation. Regardless of the nature of the claims in a particular lawsuit, 28 U.S.C. § 1821 and 28 U.S.C. § 1920 will normally control absent a more specific, applicable statute.

The modest costs allowed by § 1821 and § 1920 by no means rise to the magnitude of fee shifting that is contemplated by § 1988 or the other fee shifting statutes Congress has enacted for particular

programs. Thus, although § 1821 and § 1920 permit some limited fee shifting, they are generally consistent with the American Rule, which requires each litigant to bear his costs.

The Crawford analysis is, therefore, one concerned principally with the American Rule's antagonism to fee shifting. Such an analysis, however, is totally inapposite when a statute more specific than § 1821 and § 1920 comes into play and authorizes more than limited fee shifting.[11]

A more specific fee shifting statute, like § 1988, must be analyzed consistently with Congress' intent to provide for a full and complete remedy which, perforce, displaces totally the policy embodied in the American Rule and in § 1821 and § 1920 and, with it, the Crawford analysis. Accordingly, the focus cannot be upon Crawford, or upon § 1821, or § 1920 because, very simply, they are not § 1988. In this case, § 1988 is the statute at hand, and that statute alone is relevant to the question presented.

As to that inquiry, Jenkins is immediately relevant because it concerned § 1988, not § 1821, or § 1920, or Fed. R. Civ. P. 54(d). To argue differently suggests Jenkins was either wrongly decided or must be distinguished into an irrelevant footnote to federal statutory history.

Jenkins demonstrates that this Court does not apply the "plain meaning" rule mechanically to § 1988 and, thereby, fail to implement entirely the policy developed by Congress. Jenkins clearly stands for

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11 No question or issue about an implied repeal of either § 1821 or § 1920 exists. Section 1821(a)(1) clearly states that it applies "[e]xcept as otherwise provided by law," and § 1988 otherwise provides. Thus, § 1821 and § 1920 remain on the books as effective statutes, but, in civil rights litigation, a more specific statute, i.e., § 1988, controls, just as § 1821 and § 1920 control the more general provisions of Fed. R. Civ. P. 54(d). See Crawford Fitting Co. v. J. T. Gibbons, Inc.

the proposition that "reasonable attorney's fee" in § 1988 is not limited to the fee generated by an attorney personally. Instead, this Court, recognizing Congress' great purpose in § 1988, interpreted § 1988 so as to achieve Congress' goal and to avoid the absurd situation where an attorney would be encouraged to take on tasks that are better and more efficiently suited to non-attorneys.

Under Jenkins, paralegals' fees are compensable in an award of attorneys' fees because they are necessary to a full and complete remedy. The same can be said about experts' fees. Indeed, the work of experts is often more "crucial" to the success of litigation than is the work of paralegals. Furthermore, compensation for experts, like compensation for paralegals, serves the same purpose of encouraging attorneys to delegate tasks to non-attorneys who can more efficiently and economically perform that work.

Other than, perhaps, the educational and experiential background of experts and paralegals, the only distinction to be drawn between experts and paralegals is the fact that the latter are under contract to the attorney and the former usually are not. However, that distinction could easily be eliminated by having attorneys retain their clients' experts. Thus, WVUH concludes that the employment relationship between an attorney and an expert is not a meaningful one, and, consequently, it is not one that should be a basis for distinguishing Jenkins.

Because Jenkins cannot be persuasively distinguished, it is determinative of the question presented in this case. On the other hand, Crawford can be distinguished easily because it does not concern either § 1988 or the creation of a full and complete remedy. Instead, Crawford deals with two statutes that do not apply if other fee shifting statutes exist. Thus, Crawford is not controlling and ought not be extended beyond its stated limits. To so extend it would judicially engraft an unintended limitation upon the Congressional policy of a full and complete remedy under § 1988.

CONCLUSION

The bedrock of the Pennsylvania defendants' position is that § 1988 does not contain the words "experts' fees." However, rather than constituting a starting place for the inquiry into § 1988's proper construction, the Pennsylvania defendants would have it also constitute the stopping place. The inquiry cannot end so quickly, for to do so would ignore the established meaning of the phrase "reasonable attorney's fee" in civil rights fee shifting statutes, would frustrate Congress' manifest purpose, and would lead to an absurd and illogical result.

Congress, when it enacted the fee shifting provision of § 1988, had a broad purpose in mind. While Congress may not have had the prescience with which to identify every conceivable issue that could arise under § 1988, that does not mean courts are required to adopt limiting constructions for fear of thwarting Congress' goals or interfering with its prerogatives. Limiting the construction of statutes because Congress failed to state explicitly everything it sought to do is neither a cautious nor a wise approach. Instead, it is a disavowal of the judicial obligation to interpret a statute so as to implement Congress' policy.

Failure to effect fully what Congress intended is also judicial emasculation of the legislative powers of the Congress, a co-equal branch of government. As a result, it is constitutionally impermissible. The Court must accord Congress its full powers and perquisites by adopting constructions that achieve Congress' purposes, not shortstop them.

Accordingly, West Virginia University Hospitals, Inc., requests: (1) a reversal of the opinion and judgment of the United States Court of Appeals for the Third Circuit concerning the award of experts' fees; (2) a reinstatement of the District Court's award of experts' fees; and (3) an order directing the Court of Appeals to recalculate its award of attorneys' fees to West Virginia University Hospitals, Inc., to include compensation for time spent on the experts' fees issues before that

court. West Virginia University Hospitals, Inc., further prays for an award of reasonable attorneys' fees and costs attendant to this appeal.

Respectfully submitted,

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IN THE
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October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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No. 89-994

IN THE
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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* 1/

The question presented by this case — whether fees paid to experts are included within the attorney's fee recoverable under 42 U.S.C. § 1988 — is of vital importance to each of the *amici*.

1/ The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. The Committee has, over the past 27 years, maintained a full-time staff and enlisted the services of thousands of members of the private bar in order to address the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice and law enforcement.

The American Civil Liberties Union (the "ACLU") is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality enshrined in our Constitution and civil rights laws. In furtherance of those principles, the ACLU is involved in thousands of civil rights and civil liberties cases across the country. Some of these cases are handled by staff counsel; others by volunteer lawyers.

The ACLU of Illinois is a statewide affiliate of the national organization with its own active docket. Its lawyers represent plaintiffs in *Friedrich* v. *City of Chicago*, 888 F.2d 511 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230), another case raising the issue of expert fee awards under 42 U.S.C. § 1988.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization founded in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics in the United States.

The Puerto Rican Legal Defense and Education Fund, Inc. was founded in 1972. It seeks to insure the equal protection of the laws and to protect the civil rights of Puerto Ricans and other Latino Americans.

These organizations, and the lawyers who work with them, employ and typically bear the cost of experts needed for the effective presentation of civil rights cases. Moreover, the impact of this case is even

broader than first appears, because the decision by the Court in this litigation may affect the interpretation of other, similarly-worded civil rights fee-shifting provisions — including those in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k); and the Voting Rights Act, 42 U.S.C. § 1973*l*(e).

The full-time legal staffs of these organizations, as well as many of the firms volunteering their efforts on their behalf, often incur thousands or tens of thousands of dollars of expenses employing experts — including statisticians, demographers, sociologists, physicians, psychiatrists, economists, testing specialists, and others — in order to identify and combat discrimination and violations of constitutional and statutory rights. These experts help the lawyers collect the pertinent facts, shape the theories underlying the claims and formulate trial strategy. If necessary or appropriate, these experts also help the lawyers present the facts in a meaningful way by testifying at trial. In sum, experts are an integral and often necessary part of most civil rights litigation teams.

The clients represented by *amici* and private lawyers assisting them are generally indigent or of modest means and, therefore, can no more afford to pay the cost of experts than any of the other costs of litigation. Hence, expert fees are frequently an out-of-pocket expenditure of these attorneys.

The strain on the funds of these organizations due to the costs of experts is substantial. For example, the Lawyers' Committee alone has spent hundreds of thousands of dollars in expert fees in pending cases. *See, e.g., Martin* v. *Mabus*, Nos. J84-0708(B) and J85-0960(B) (S.D. Miss. Feb. 27, 1990) (denying $78,395.57 in expert fees). Expert fees generally equal 15-20% of the total amount of attorneys' fees awarded in successful Committee cases, *see, e.g., Martin* v. *Mabus, supra*; *Jordan* v. *Allain*, 619 F. Supp. 98 (N.D. Miss. 1985); *Connor* v. *Winter*, 519 F. Supp. 1337 (S.D. Miss. 1981), and represent a significant part of the Committee's budget.

When expert fees are denied, the result can effectively nullify any attorney's fee award. *Major* v. *Treen*, 700 F. Supp. 1422 (E.D. La. 1988), a voting rights case in which plaintiffs successfully obtained declaratory and injunctive relief, but in which no damages were sought, is a good illustration. The court there granted prevailing plaintiffs $23,428.17 in attorneys' fees (including $7,308.97 for reimbursement of costs) for the main litigation for the services of Steven Scheckman, a lawyer practicing in a two-person firm, but denied a request for $23,675 in expert fees he incurred, holding that expert fees were not compensable in such cases. Hence, notwithstanding Section 1988's guarantee of a "fully compensatory fee," this successful lawyer suffered a net *loss* of $7,555.80.

Amici are deeply concerned that, unless expert fees are recoverable under Section 1988, the objectives of that Section and perhaps other similar civil rights fee-shifting statutes will be frustrated and the ability of *amici* to represent and induce others to represent plaintiffs with meritorious civil rights claims will be severely impaired.

SUMMARY OF ARGUMENT

This Court recently made clear that a "reasonable attorney's fee" under Section 1988 is not limited to fees for work personally performed by an attorney, but refers "to a reasonable fee for the work product of an attorney." *Missouri* v. *Jenkins*, 109 S. Ct. 2463, 2470 (1989). The costs of experts — who play a vital role in assisting lawyers effectively to prepare and present claims in civil rights litigation — are surely as much an integral part of the attorney's work product as the costs of paralegals, secretaries, messengers, librarians, janitors and other expenditures which the Court in *Jenkins* viewed as indisputably recoverable as part of an "attorney's fee."

This Court has emphasized that, in enacting Section 1988, Congress intended to guarantee a "fully compensatory fee" because only such a fee would provide the necessary incentive to prosecute claims that vindicate the public interest in the enforcement of civil rights. The fees of experts are expenses often borne by attorneys handling civil

rights cases on behalf of needy clients. Unless the very substantial costs of experts may be recovered as part of a Section 1988 fee application, attorneys will not be able to collect a fully compensatory fee and may either provide ineffective representation by dispensing with experts essential to adequate preparation or presentation or decline altogether to undertake civil rights litigation on behalf of the poor and dispossessed.

Section 1988 was specifically intended to overcome the detrimental effects which the Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), might have had on civil rights litigation. The legislative history shows that, in enacting the fee provision, Congress intended to restore the vitality of pre-*Alyeska* cases, in many of which successful civil rights litigants sought and obtained reimbursement for expert fees. The legislative history also shows that, in enacting Section 1988, Congress deliberately copied the language of other civil rights fee-shifting provisions in order to embrace the judicial interpretation of those provisions. Many of the lower court cases construing those provisions specifically read "attorney's fee" to encompass expenditures for experts. The decision below, which held that expert fees are not recoverable under Section 1988, is an unreasonable limitation of that Section and sharply at odds with the intent of Congress.

The court below wrongly concluded that the question presented here was controlled by *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). That case, which delineated the scope of costs recoverable under Rule 54(d) of the Federal Rules of Civil Procedure, has no bearing on the question of whether the provision for an attorney's fee in Section 1988 permits the recovery of expert fees.

ARGUMENT

I

ONLY THE ALLOWANCE OF EXPERT FEES WILL GUARANTEE THE FULLY COMPENSATORY FEE REQUIRED BY SECTION 1988

Congress enacted the fee provision of Section 1988 to insure that prevailing civil rights plaintiffs would receive a "fully compensatory fee." *Missouri* v. *Jenkins*, 109 S. Ct. 2463, 2470 (1989); *Hensley* v. *Eckerhart*, 461 U.S. 424, 435 (1983). 2/ This fee must compensate not only for the time charges of the attorney, but also for all elements comprising "the work product of an attorney" used to vindicate the injury to civil rights, including the efforts of all persons "whose labor contributes to the work product for which an attorney bills her client." *Missouri* v. *Jenkins*, 109 S. Ct. at 2470. For example, in acknowledging that paralegal costs are within the scope of Section 1988, this Court held that a "reasonable attorney's fee" must take account of "secretaries, messengers, librarians, janitors, and others . . . ; and it must also take account of other expenses and profit." *Id.* 3/

The work of experts contributes as significantly to the work product of lawyers in civil rights litigation as the activities enumerated by the Court in *Jenkins*. *See Friedrich* v. *City of Chicago*, 888 F.2d 511, 514–15 (7th Cir. 1989) (analogizing from *Jenkins* and concluding that expert fees are recoverable), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89–1230). Moreover, regardless of the billing

2/ 42 U.S.C § 1988 provides in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

3/ The same point was made by a sponsor of the bill that became the fee provision of Section 1988: "[T]he phrase 'attorney's fee' would include the values of the legal services provided by counsel, *including all incidental and necessary expenses incurred in furnishing effective and competent representation*." 122 Cong. Rec. H12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan) (emphasis added).

mechanics, the cost of the expert is as much an expense of hiring a lawyer as the cost of paralegals in the lawyer's employ.

It is the lawyer who decides that an expert is needed for the proper presentation of the case and who usually selects the expert. Thereafter, the lawyer employs the expert to advise her, to interpret data and to help the lawyer devise trial strategy. The lawyer and the expert also work together to prepare any testimony the expert gives at trial. 4/ As Judge Posner said, in affirming a decision that expert fees are recoverable under Section 1988:

> Experts are not only hired to testify; sometimes they are hired, also or instead, to educate counsel in a technical matter germane to the suit. The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise. To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work.

Friedrich, 888 F.2d at 514. There is no need to look further than the opinions of this Court over more than three decades for confirmation of the importance attached to expert testimony in civil rights cases. 5/ In fact, the ultimate effect of many opinions of this Court is to require

4/ *See generally Using Experts in Civil Cases* (M. Kraft 2d ed. 1982); *see also Ake* v. *Oklahoma*, 470 U.S. 68, 80–82 (1985) (recognizing importance of multiple roles played by psychiatrist in criminal insanity proceedings). This Court has recognized the important role played by investigators in forming the "work product" of the attorney. *United States* v. *Nobles*, 422 U.S. 225, 237–39 (1975) (investigator's reports protected from discovery under the work product doctrine). Experts clearly play an even more substantial role than investigators.

5/ *See, e.g., Thornburg* v. *Gingles*, 478 U.S. 30, 52 (1986) ("The investigation conducted by the District Court into the question of racial bloc voting . . . relied principally

(Continued)

expert testimony in order for civil rights litigants to prevail in certain types of cases. [6/]

Unless expert fees are included within the fees recoverable under Section 1988, fee awards will not be "fully compensatory" because any award for an attorney's fee will be offset, in whole or in part, by expenditures for experts. For example, as noted above, in *Major* v. *Treen*, 700 F. Supp. 1422 (E.D. La. 1988), the costs of experts exceeded by $7,555.80 the net $16,119.20 attorney's fee recovered for the work of plaintiff lawyer Scheckman. Similarly, in *Cobbs* v. *Grenada County*, No. WC84-136-S-O (N.D. Miss. Sept. 13, 1989), the court granted prevailing civil rights plaintiffs $12,000 in attorneys' fees but denied a request for $7,500 in expert fees incurred, holding that expert fees are not compensable. The offset is likely to be substantial, because the fees reasonably charged by experts in civil rights cases reflect the value of their specialized knowledge and skills. *See, e.g., Ramos* v. *Lamm*, 713 F.2d 546, 559 (10th Cir. 1983) (affirming award of $20,219.70 in expert fees in prison conditions case); *Thornberry* v. *Delta Air Lines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982) ($83,918 in expenses primarily for "expert computer witnesses" found "essential" to proof of Title VII

(Continued)
on statistical evidence presented by [plaintiffs'] expert witnesses . . . ."); *Tennessee* v. *Garner*, 471 U.S. 1, 10-11 & n.10 (1985) (finding civil rights violation by relying on, among other things, affidavit of expert on police procedure); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (employment discrimination may be proven using statistical methods demonstrating disparate impact); *Brown* v. *Board of Educ.*, 347 U.S. 483, 494 & n.11 (1954) (relying on psychological and sociological evidence of impact of "separate but equal" facilities).

6/ *See, e.g., Carey* v. *Piphus*, 435 U.S. 247, 263-64 (1978) (mental and emotional distress arising out of due process violation not compensable absent objective proof of actual injury); *Craig* v. *Boren*, 429 U.S. 190 (1976) (statistical studies may show sex discrimination); *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (prisoner may prove Eighth Amendment violation with evidence of deliberate indifference to medical needs); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (testing specialists may show employment tests to be improperly discriminatory); *Griggs*, *supra*; *cf. O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (claim for failure of mental health institution to release patient, such as Donaldson, might be proven with expert testimony).

case), *vacated on other grounds*, 461 U.S. 952 (1983); *Martin* v. *Mabus*, Nos. J84-0708(B) and J85-0960(B) (S.D. Miss. Feb. 27, 1990) (denying $78,395.57 in expert fees in voting rights case as non-recoverable; expert fees not paid equaled 18% of recovered attorneys' fees).

Moreover, Congress was particularly concerned about needy civil rights plaintiffs who lack the resources to pay for the costs of legal representation. [7/] At the same time, some of the most significant civil rights cases seek only equitable or declaratory relief, leaving no monetary award from which expert fees can be reimbursed. [8/] Hence, unless Section 1988 permits recovery of expert fees, the civil rights lawyer often is faced with a Hobson's choice: Forego use of the expert (which may require the lawyer to abandon the entire case), or bear the cost herself. This choice is especially difficult because the typical civil rights practitioner is, contrary to popular misconceptions, a small, local firm that, like public-interest, nonprofit organizations such as *amici*, does not have extensive resources to devote to paying experts. *See* Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorneys Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 768-69 (1988). Money expended on experts, of course, is unavailable to support other civil rights litigation that civil rights lawyers would otherwise undertake.

Civil rights lawyers have emphasized the burdens imposed by expert fees as part of the more general economic obstacles to effective legal representation in civil rights cases. At Senate hearings held in 1973 to consider the effects of legal fees on citizen access to lawyers and the courts, one lawyer testified:

7/ S. Rep. No. 1011, 94th Cong., 2d Sess. ["Senate Report"] 2 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer."), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910; H.R. Rep. No. 1558, 94th Cong., 2d Sess. ["House Report"] 1 (1976) ("a vast majority of the victims of civil rights violations cannot afford legal counsel").

8/ *See, e.g., Thornburg v. Gingles, supra; Brown v. Board of Educ., supra; cf. Blanchard* v. *Bergeron*, 109 S. Ct. 939, 945 (1989) (refusing to limit § 1988 attorney's fee based on damages proven at trial).

> Now, when a public interest law firm is involved, or when a group of citizens or even an individual citizen decides to take on a big case and to present the views of the other side in a big case . . . there is simply no money up front. . . . [T]here is very little money for such essential things as, for example, expert witnesses. And so what I found . . . was that I did not have any money at all to pay any expert anything. . . .
>
> . . .
>
> As a result, the public interest lawyer must pare off very important issues — that might even be winning issues — simply because they are either too technical or too big, or require too much expenditure of money.

The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 832–34 (1973) (statement of Dennis Flannery); *see also id.* at 799, 812, 816 (statements of other witnesses); *id.* at 1108, 1127, 1128 (statement of Senator Tunney, who sponsored a bill which became § 1988). [9/]

In short, the refusal to award expert fees will deny lawyers a "fully compensatory fee," thereby diminishing the incentive provided by Section 1988. As this Court observed, without a fully compensatory fee, "the prospect of . . . hardship [induced by the failure to compensate] could well deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large; this result would work to defeat Congress' purpose in enacting § 1988 of 'encourag(ing) the enforcement of federal law through lawsuits filed by private persons.'" *Missouri* v. *Jenkins*, 109 S. Ct. at 2469 n.6 (quoting

9/ A representative of the Lawyers' Committee testified similarly before the House of Representatives. *Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 89, 100 (1975) (some cases "cannot be brought" because, *inter alia*, private attorneys for plaintiffs cannot "afford the technical assistance of expert witnesses"); *see also* House Report at 2–3 (same).

Pennsylvania v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 737 (1987) (Blackmun, J., dissenting)). [10/]

Even in cases in which there is a monetary recovery from which the lawyer could obtain reimbursement for expert fees she advanced, civil rights plaintiffs would be left with a reduced recovery, thereby diminishing their incentive to initiate civil rights litigation.

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 (codified at 42 U.S.C. § 1988) reveals that Congress was as concerned about the need to insure that potential plaintiffs have the incentive to bring meritorious civil rights claims as it was about the need to insure that lawyers would prosecute them:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. *Unless the judicial remedy is full and complete, it will remain a meaningless right*. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. ["House Report"] 1 (1976) (emphasis added). [11/]

10/ *See also Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances.") (quoting House Report at 1); *Blanchard* v. *Bergeron*, 109 S. Ct. 939, 945 (1989) (same).

11/ *See also* Senate Report at 2 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then *citizens must have the opportunity to recover what it costs them* to vindicate these rights in court.") (emphasis added).

This Court has made the same point about the purpose of the identically-worded fee provision of Title VII of the Civil Rights Act of 1964:

> the central purpose of § 706(k) is to vindicate the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law — assuring that the incentive to such suits will not be reduced by the prospect of attorney's fees that consume the recovery.

Independent Federation of Flight Attendants v. *Zipes*, 109 S. Ct. 2732, 2736 (1989) (citing *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968)). In sum, the cost of experts is a necessary and important part of the cost of effective legal representation in civil rights litigation and falls directly within the concerns which Congress sought to address when it enacted the attorney's fee provision of Section 1988. Section 1988, therefore, should be read to include compensation for expert fees in order to assure a "fully compensatory fee" and maintain the incentive to prosecute meritorious civil rights claims.

II

CONGRESS ENACTED THE FEE PROVISION OF SECTION 1988 IN ORDER TO OVERTURN *ALYESKA* AND INCORPORATE EXISTING CASE LAW UNDER WHICH EXPERT FEES HAD BEEN GRANTED

The historical background to Section 1988 is also persuasive evidence that Congress used the phrase "attorney's fee" as a shorthand for all expenditures, including expert fees, needed for effective legal representation in civil rights cases. As this Court has said, a reliable "guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 463 (1892).

Prior to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), numerous courts in cases

brought under civil rights statutes without express fee-shifting provisions granted compensation for the charges of experts, along with expenditures for legal representation, as part of costs. These courts recognized that such compensation achieved equity in civil rights cases and gave an appropriate incentive to "private attorneys general" to vindicate their statutory and constitutional rights. [12/] *Alyeska* held that an attorney's fee was not recoverable in civil rights cases because courts did not have this equitable discretion and, except as provided in statutes enumerating recoverable costs, could not award any of the expenses of litigation in civil rights cases. In passing the Civil Rights Attorney's Fees Awards Act of 1976 (codified at 42 U.S.C. § 1988), Congress specifically undertook to overrule *Alyeska* and restore the incentives guaranteed by prior case law. *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983); 122 Cong. Rec. S16,252 (daily ed. Sept. 21, 1976); *id.* at H12,154, H12,155 (Oct. 1, 1976). Accordingly, courts applying Section 1988 should have the same power to award expert fees that they had prior to *Alyeska*.

Further, Congress made clear its intention that the fee provision of Section 1988 be construed in the same way as the identical language

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12/ *See, e.g., Fairley* v. *Patterson*, 493 F.2d 598, 606 n.11 (5th Cir. 1974); *Welsch* v. *Likins*, 68 F.R.D. 589, 596-97 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975); *Wallace* v. *House*, 377 F. Supp. 1192, 1206-07 (W.D. La. 1974), *vacated in relevant part for reconsideration in light of Alyeska*, 515 F.2d 619, 638 (5th Cir. 1975), *vacated*, 425 U.S. 947 (1976); *Sabala* v. *Western Gillette, Inc.*, 371 F. Supp. 385, 394 (S.D. Tex. 1974), *remanded in relevant part for reconsideration in light of Alyeska*, 516 F.2d 1251, 1267-69 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *Sims* v. *Amos*, 340 F. Supp. 691, 695 & n.11 (N.D. Ala.), *aff'd*, 409 U.S. 942 (1972); *Jones* v. *Wittenberg*, 330 F. Supp. 707, 722 (N.D. Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972); *Bradley* v. *School Bd.*, 53 F.R.D. 28, 44 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), *vacated*, 416 U.S. 696 (1974); *Wright* v. *McMann*, Nos. 66-CV-77, 67-CV-174 (N.D.N.Y. Aug. 19, 1970), *noted in Wallace*, 377 F. Supp. at 1207, *aff'd in part, rev'd in part on other grounds*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); *see also Copeland* v. *School Bd.*, 464 F.2d 932, 934 (4th Cir. 1972) (decision to award expert witness fees within discretion of trial court); *cf. Wolf* v. *Frank*, 477 F.2d 467, 480 (5th Cir.) (expert fees awardable since private litigation furthers goals of securities laws), *cert. denied*, 414 U.S. 975 (1973); *Bebchick* v. *Public Utils. Comm'n*, 318 F.2d 187, 204 (D.C. Cir.) (same result in public transport case), *cert. denied*, 373 U.S. 913 (1963); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 102 (N.D. Cal. 1972) (same result in highways case).

of the fee provisions of other civil rights statutes had been construed by the federal courts.

> S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e). . . . It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910, 5912; *see also Hanrahan* v. *Hampton*, 446 U.S. 754, 758 n.4 (1980); House Report at 5, 6 ("Because other statutes follow [the approach of § 1988], the courts are familiar with [the terms used] and in fact have reviewed, examined, and interpreted them at some length."). [13/]

Congress explicitly incorporated and endorsed the prior case law construing these other fee provisions so as to give the phrase "reasonable attorney's fee" meaning without need to resort to item-by-item delineation of reimbursable expenditures. The prior decisions interpreting these statutes, [14/] including two cases specifically cited in the Senate Report, [15/] allow recovery of expert fees. This Court has previously considered these two cases as authoritative sources on the construction of Section 1988. *See, e.g., Blum* v. *Stenson*, 465 U.S. 886, 893-94 (1984); *Hensley* v. *Eckerchart*, 461 U.S. at 431.

It is thus plain that Congress specifically intended Section 1988 to restore the equitable principles of pre-*Alyeska* decisions — many of which applied these principles to award expert fees. The language chosen by Congress also was designed to encompass lower court decisions interpreting identically-worded provisions of other fee-shifting civil rights statutes, including decisions that awarded recovery of expert fees in order to maintain the incentive needed to encourage effective enforcement of civil rights.

III

CRAWFORD FITTING IS INAPPLICABLE TO THIS CASE

The court below felt constrained to deny petitioner expert fees in excess of $30 per day because of this Court's opinion in *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). The decision below, we submit, was based on a fundamental misreading both of the reach of the *Crawford Fitting* opinion and of the policies that give force to Section 1988.

The only question addressed in *Crawford Fitting* was whether Rule 54(d) of the Federal Rules of Civil Procedure afforded federal courts discretion to award as costs expert witness fees in excess of the witness fees specifically enumerated in 28 U.S.C. §§ 1821 and 1920. 482 U.S. at 439, 441-42. The parties in that case relied entirely on Rule 54(d) and did not seek recovery under any other provision of law. [16/]

13/ Because Congress adopted existing statutes and accepted those statutes' judicial glosses in crafting Section 1988, it is not appropriate to resort solely or primarily to a textual analysis of Section 1988 when seeking its meaning. *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-98 (1979); *cf. Hughes* v. *Rowe*, 449 U.S. 5 (1980) (adopting differing recovery standards for plaintiffs and defendants under § 1988, despite language which grants fees to "prevailing party").

Similarly, the fact that some later fee-shifting statutes and some fee-shifting statutes in unrelated areas of the law make specific reference to expert witness fees has no bearing on the proper interpretation of Section 1988. *See Friedrich* v. *City of Chicago*, 888 F.2d 511, 517 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230).

14/ *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 400 F. Supp. 993, 997 (S.D.N.Y. 1975) (Title VII), *aff'd*, 542 F.2d 579 (2d Cir. 1976); *Davis* v. *County of Los Angeles*, 8 E.P.D. (CCH) ¶ 9444 (C.D. Cal. 1974) (same); *see also Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975) (expert fees recovered pursuant to identically-worded 20 U.S.C. § 1617).

15/ Senate Report at 6 (citing with approval *Davis* and *Swann*).

16/ *Crawford Fitting* was an antitrust case; its companion case was brought pursuant to Title VII and 42 U.S.C. § 1981. Although both sets of statutes have provisions relating to the shifting of litigation expenses, the cases as presented to the Court concerned only Rule 54(d). *See* 482 U.S. at 439; *id.* at 446 n.1 (Marshall, J., dissenting).

The Court's opinion, therefore, never construes any other statute and, in particular, never addresses the question presented here: Whether expert fees are recoverable under Section 1988, a statute passed specifically to overcome the limitations of Rule 54(d). *See id.* at 445 (Blackmun, J., concurring); *id.* at 446 n.1 (Marshall, J., dissenting).

The opinion of the Court in *Crawford Fitting* does assert: "We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." 482 U.S. at 445. The court below apparently read this Court's reference to "explicit" authorization to mean that expert fees are not recoverable under Section 1988 unless that statute "expressly" refers to expert fees. 885 F.2d at 34. But references to "explicit" and "expressly" merely beg the question, which is whether the phrase "attorney's fee" as used in the context of Section 1988 includes expenditures for experts. The common sense reading of "attorney's fee" mandated by this Court in *Jenkins* and the noble and generous spirit encapsulated by Section 1988 compel the conclusion that expert fees — costs so frequently ... e by, and invariably incurred in aid of, civil rights lawyers — are included within the "attorney's fee" recoverable under that Section.

Finally, the Court's statement of its holding in *Crawford Fitting* is directed solely to "the expenses of a litigant's *witness*." 482 U.S. at 445 (emphasis added). Even if Section 1988 were not read to override any limitation imposed by Sections 1821 and 1920, *Crawford Fitting* has no bearing on the many out-of-court services performed by experts for which much of the compensation under Section 1988 is sought. *See Friedrich*, 888 F.2d at 515; *see also Denny* v. *Westfield State College*, 880 F.2d 1465, 1474 (1st Cir. 1989) (Breyer, J., concurring).

CONCLUSION

The cost of experts is a substantial and often necessary part of the costs of an attorney's work product in civil rights litigation. A refusal to award such fees to a successful litigant is inconsistent with the "fully compensatory fee" guaranteed by Section 1988 and the purpose of that Section to encourage vigorous enforcement of civil rights.

For the reasons set forth above, the order of the court of appeals concerning expert fees should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,
Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

The Equal Employment Advisory Council (EEAC or Council) respectfully submits this brief amicus curiae. Letters of consent on behalf of both parties have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote

sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are committed firmly to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to various employment and labor laws, including Titles VI and VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, *et seq.* and 2000e, *et seq.* EEAC's member companies also must comply with 42 U.S.C. § 1981 and the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, as well as other employment discrimination statutes. Although this case concerns the issue of medicaid and hospital expert fees awardable to a prevailing party under 42 U.S.C. § 1988, many EEAC member companies, as employers, are subject to the same fee shifting statute since Section 1981, Title VI and the Rehabilitation Act all borrow Section 1988, permitting the shifting to a prevailing party "a reasonable attorney's fee as part of the costs."

Similarly, a "prevailing party" under Title VII is permitted "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k). Also, the Equal Pay Act, 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, borrow the language from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, that permits a court to "allow a

reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Thus, EEAC has a direct interest in the issue presented for the Court's consideration in the instant case: whether an award of attorney's fees to a prevailing party under Section 1988 may include compensation for expert witnesses in excess of $30 per day, the limit set by 28 U.S.C. § 1821(b).

As a result of its interest in the issue of Section 1988 and attorney's fees, EEAC has filed briefs with this Court in *City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234 (1985); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), among others. EEAC also has filed briefs to the Eleventh Circuit, and to this Court in support of the petition for a writ of certiorari in *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir.), *cert. denied*, 109 S.Ct. 378 (1988), a case addressing the precise issue presented herein.

Because of its significant experience, EEAC is thus uniquely situated to brief this Court on the relevant concerns of the business community and, in accord with Supreme Court Rule 37, the importance of this case beyond that brought to this Court's attention by the parties.

STATEMENT OF THE CASE

The West Virginia University Hospital (the Hospital or Petitioner) sued the Commonwealth of Pennsylvania over the state's limitation of medicaid payments to out-of-state hospitals. In preparing for litigation, and throughout the six day trial itself, the Hospital relied upon three expert witnesses to

establish as inadequate the state's medicaid payment system and the administrative appeals system under which payment rates can be reviewed.

The district court ruled that Pennsylvania's payment and appeals systems violated federal law, namely the Social Security Act and the Fourteenth Amendment's Equal Protection Clause. *West Virginia University Hospitals, Inc. v. Casey*, 701 F. Supp. 496, 526 (M.D. Pa. 1988). The judge awarded $350,000 in attorney's fees, as well as $45 867 in disbursements, pursuant to Section 1988, which provides that "in any action . . . to enforce a provision of [a relevant law], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Significantly, the judge also awarded as costs the full amount of expert witness fees, even though 28 U.S.C. § 1821(b) limits expert witness fees to $30 per day.

The Third Circuit vacated the district court's award of excess expert fees. *West Virginia University Hospitals, Inc. v. Casey*, 885 F.2d 11, 32-35 (3d Cir. 1989). In doing so, it relied upon this Court's ruling in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987), that Section 1821(b) limits expert fees to $30 a day even though Federal Rule of Civil Procedure 54(d) allows "costs . . . to the prevailing party unless the court otherwise directs." According to the Third Circuit below, *Crawford Fitting* also contains broad language suggesting that in the case of a fee shifting statute such as Section 1988, a court may not award fees in excess of the statutory maximum unless the fee shifting statute expressly makes such an allowance. To do otherwise would be to "infer that Congress has repealed" Section 1821—an inference this Court rejected in *Crawford Fitting*. The Third Circuit also reasoned that a judge is not empowered to exceed statutory limitations without plain evidence of congressional intent, which is absent with regard to Section 1988. 885 F.2d at 34.

SUMMARY OF ARGUMENT

This case involves the interrelation between three statutes. 42 U.S.C. § 1988 permits a court to award to a prevailing party the attorney's fees and costs associated with bringing a civil rights or other specified lawsuit. As part of such "costs," 28 U.S.C. § 1920 permits a court to shift expert witness fees to a losing party, but 28 U.S.C. § 1821 limits the amount of the expert witness fee that can be shifted to $30 per day. The Third Circuit below correctly construed these three statutes, and limited to $30 per day the amount of expert fees that a court may shift in a Section 1988 case.

In so ruling, the Third Circuit properly relied upon *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987), in which this Court ruled that Sections 1920 and 1821 place a cap on the shifting of expert fees for purposes of Rule 54(d) of the Federal Rules of Civil Procedure. Indeed, in very broad language that could apply beyond Rule 54(d) and equally well to this Section 1988 case, *Crawford Fitting* held "that when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of § 1821, absent contract or explicit statutory authority to the contrary." 107 S.Ct. at 2496.

The Hospital argues herein that courts ought to have greater discretion in shifting the costs for experts, but this Court made clear in *Crawford Fitting*

that Congress knew what it was doing when it enacted Sections 1920 and 1821. This Court stated that it "will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision referring explicitly to witness fees." 107 S.Ct. at 2499. Indeed, acceptance of the Hospital's argument herein "renders § 1920 superfluous." *Id.* at 2497. As in *Crawford Fitting*, "repeals by implication are not favored, and petitioners proffer the ultimate in implication"—for Section 1988 and Section 1821 "are not even inconsistent." *Id.*

Accordingly, this Court should extend *Crawford Fitting* to deny the shifting of excess expert fees in this Section 1988 case, a result that is also supported by the reasoned opinions in several other courts of appeals. In so ruling, moreover, this Court should recognize that the statutory limit on the amount of expert fees a court may shift applies to both testimonial and nontestimonial work.

Such an extension of *Crawford Fitting* will not conflict with this Court's recent decision in *Missouri v. Jenkins*, 109 S.Ct. 2463 (1989), which permitted the shifting of fees for paralegals and other law firm employees. Paralegals, unlike expert witnesses "contribute[] to the work product for which an attorney bills [the] client." *Id.* at 2470. Moreover, paralegal fees are not regulated by statute, whereas witness fees are expressly governed by Section 1821.

In addition, such an extension of *Crawford Fitting* will not frustrate the civil rights laws, but rather will further Congress' policy of imposing some restraint upon the fees and costs that a court can impose upon a losing party. Such limitations are crucial for the amicus, EEAC, since its member companies face litigation under the various discrimination and civil rights statutes that often involve expensive statistical analyses by experts. More importantly, extension of *Crawford Fitting* to Section 1988 will lead to a much-needed consistency among the various fee shifting statutes.

ARGUMENT

I. THIS COURT SHOULD EXTEND ITS *CRAWFORD FITTING* RULE SO AS TO DENY THE SHIFTING OF UNCAPPED EXPERT WITNESS FEES IN A SECTION 1988 CASE

The Third Circuit below correctly concluded that under this Court's rule in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494 (1987), "section 1988 as presently drafted does not authorize expert fee awards in excess of the statutory cap of thirty dollars per day provided in section 1821(b)." 885 F.2d 11, 35. As we now show, the Third Circuit's extension of *Crawford Fitting* reflects a proper construction of the relevant statutes and leads to a result consistent with congressional intent and with other reasoned court interpretations.

A. Section 1988 Permits A Court To Award "Costs" To A Prevailing Party, But Section 1821 Limits The Shifting Of Such Costs To A Specified Amount For An Expert Witness

This case involves three statutes and their interrelation. The first, 42 U.S.C. § 1988, is a statutory exception to the general rule that each party must bear his own attorney's fees and costs. It provides that "in any action . . . to enforce a provision of [a relevant law], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee

as part of the costs."[1] Section 1988 governs the shifting of attorney's fees and costs in several civil rights and discrimination statutes, and is similar to other fee shifting statutes found in other discrimination laws, such as Title VII of the Civil Rights Act of 1964.

The second statute, 28 U.S.C. § 1920, states that a federal judge "may tax as costs" against a losing party several specifically enumerated items, such as "[f]ees and disbursements for . . . witnesses."[2] Section 1920 is the present day embodiment of "Congress' considered choice as to the kinds of expenses

---

[1] 42 U.S.C. § 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d *et seq.*] *the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs.* (Emphasis added).

[2] 28 U.S.C. § 1920 provides:

> *A judge or clerk of any court of the United States may tax as costs* the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) *Fees* and disbursements *for* printing and *witnesses*;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." (Emphasis added).

that a federal court" may shift. *Crawford Fitting*, 107 S.Ct. 2496.

The third statute, 28 U.S.C. § 1821, defines the "witness fee" specified in Section 1920. Section 1821, in clear and unambiguous language, states that "[e]xcept as otherwise provided by law . . . [a] witness shall be paid an attendance fee of $30 per day for each day's attendance."[3]

"The logical conclusion from the language and interrelation," *Crawford Fitting* at 2497, of these three statutes leads to only one possible conclusion: that Sections 1920 and 1821 limit to $30 per day the amount a court may shift under Section 1988 to a prevailing party as costs for an expert witness. As we now show, this Court has so ruled for purposes of the Federal Rules of Civil Procedure (Fed.R.Civ.P.), and should so rule for this case.

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[3] The witness fee specified in Section 1920(3) is defined in 28 U.S.C. § 1821 as follows:

> (a)(1) *Except as otherwise provided by law*, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> * * *
>
> (b) *A witness shall be paid an attendance fee of $30 per day for each day's attendance.* A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance." (Emphasis added).

B. In *Crawford Fitting*, This Court Held That Section 1821 Limits The Shifting Of Expert Witness Fees For Purposes Of Fed. R. Civ. P. 54(d). And Strongly Implied That Its Ruling Should Have Broad Applicability To Other Fee Shifting Statutes

In *Crawford Fitting*, this Court examined the interrelation between Section 1920, Section 1821 and Fed.R.Civ.P. 54(d)—which provides that "costs shall be allowed" against the losing party unless the court otherwise directs.[4] The Court began:

> The logical conclusion from the language and interrelation of these provisions is that § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs.

107 S.Ct. at 2497. In very broad language that seemed to encompass more than the three statutes directly at issue in *Crawford Fitting*—even, by implication, statutes such as Section 1988—this Court went on to hold "that when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of § 1821, absent contract or explicit statutory authority to the contrary." *Id.* at 2496.

In so holding, this Court expressed obvious concern that its decision be consistent with Section 1988, and that it "conforms to prior interpretations" of the

[4] Federal Rule of Civil Procedure 54(d) provides in part: "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

relevant fees statutes, namely *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). 107 S.Ct. 2498-99. *Alyeska* had rejected the idea that courts could use their equitable power to award attorney's fees under the "private attorney general" theory, and served as the impetus behind Congressional enactment of Section 1988. As this Court stated in *Crawford Fitting* at 2499:

> Although Congress responded to our decision in *Alyeska* by broadening the availabilty of attorney's fees in the federal courts, see . . . 42 U.S.C. § 1988, it has not otherwise "retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors." 421 U.S. at 260. Thus, *we are once again asked to hold that a specific congressional enactment on the shifting of litigation costs is of no moment. We think that, as in Alyeska, Congress has made its intent plain in its detailed treatment of witness fees.* (Emphasis added).

As if it were contemplating the very case presented herein, this Court In *Crawford Fitting* went on to state:

> *We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision referring explicitly to witness fees.* As always, "[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), quoting *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974). Any argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to super-

> sede that section ignores our long-standing practice of construing statutes *in pari materia*. See *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-169 (1976); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 24 (1976).

107 S.Ct. at 2499. (Emphasis in original in part and added in part).

Like the Hospital herein, the Petitioners in *Crawford Fitting* had argued that federal courts should have the discretion to award costs above and beyond those listed in Section 1920, and in excess of the amount provided in section 1821. This Court rejected such an argument in unambiguous, unmistakable language:

> *We think, however, that no reasonable reading of these provisions together can lead to this conclusion, for petitioners' view renders § 1920 superfluous.* If Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever. We think the better view is that § 1920 defines the term "costs" as used in Rule 54(d). Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). *It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party.* One of the items enumerated in § 1920 is the witness fee, set by § 1821 at $30 per day. *Id.* at 2497. (Emphasis added).

True, concurring Justice Blackmun, and dissenting Justices Marshall and Brennan, all emphasized that the Court in *Crawford Fitting* did not reach the specific question whether a court may award excess ex-

pert witness fees under section 1988. 107 S. Ct. at 2499 (Blackmun, J., concuring); *id.* at 2500 n. 1 (Marshall, J., dissenting).[5] In its dicta, however,

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[5] This Court's decision in *Crawford Fitting* actually consists of two companion cases, *Crawford Fitting* and *Champion Int'l Corp. v. Int'l Woodworkers of America*, 790 F.2d 1174 (5th Cir. 1986), *aff'd*, 107 S.Ct. 2494 (1987). Indeed, the *Woodworkers* case involved allegations of race discrimination under 42 U.S.C. § 1981, and thus Section 1988, the precise statute at issue herein. 107 S.Ct. at 2496 ("In No. 86-328, respondent IWA sued petitioner Champion International, alleging racial discrimination in violation of Title VII and 42 U.S.C. § 1981.")

Nevertheless, in his dissent in *Crawford*, Justice Marshall (along with Justice Brennan) stated:

> I do not understand today's decision to decide the question whether a district court may award expert witness fees under 42 U.S.C. § 1988.
>
> [*Crawford*] is an antitrust case; obviously § 1988 is not at issue in that case. And, as an examination of the record reveals, the issue is not properly before the Court in [*Woodworkers*] either. In that case, petitioner, a prevailing civil rights defendant, made a motion for attorney's fees "and expenses" under § 1988 and filed a bill of costs under Rule 54(d). The bill of costs included $31,333.87 for "expert witness fees and expenses." Record 38. On December 30, 1982, the District Court summarily denied the motion for attorney's fees and expenses, based on its conclusion that, under *Christianburg* [*sic*] *Garment Co. v. EEOC*, 434 U.S. 412 (1978), "the lawsuit was brought in good faith and was neither frivolous, unreasonable nor without foundation." Record 1. The court referred all other questions concerning the taxing of costs to a magistrate. *Id.*, at 2. Petitioner did not appeal the District Court's order denying attorney's fees under § 1988. It appealed only the District Court's order of August 24, 1983, denying its application for expert witness fees under Rule 54(d). See Record 33.

107 S.Ct. at 2500 n.1.

this Court came as close as possible to indicating the majority view on the precise issue herein when it stated as follows:

> *We cannot accept an interpretation of Rule 54(d) that would render any of these specific statutory provisions entirely without meaning. Repeals by implication are not favored, and petitioners proffer the ultimate in implication, for Rule 54(d) and §§ 1920 and 1821 are not even inconsistent.* We think that it is clear that in §§ 1920 and 1821, Congress comprehensively addressed the taxation of fees for litigants' witnesses. This conclusion is all the more compelling when we consider that § 1920(6) allows the taxation, as a cost, of the compensation of court-appointed expert witnesses. *There is no provision that sets a limit on the compensation for court-appointed expert witnesses in the way that § 1821 sets a limit for litigants' witnesses. It is therefore clear that when Congress meant to set a limit on fees, it knew how to do so.*

Id. at 2497-98.

In this case, the Hospital asks for an interpretation of Section 1988 that would similarly render Sections 1920 and 1821 "without meaning." Indeed, as in *Crawford Fitting*, the Hospital's request for such a "repeal by implication" is the "ultimate in implication" since Section 1988 is "not even inconsistent" with Sections 1920 and 1821. The Hospital would view a strict construction of these statutes by this Court as "the literal perfection of linguistic purists." Petitioner's Brief at 15 (hereinafter Pet. Br.). But any other reading would emasculate Sections 1920 and 1821.

As we now show, for these and other reasons, this Court should extend *Crawford Fitting* to deny the shifting of expert fees in a Section 1988 case.

C. This Court Should Strictly Construe The Relevant Statutes, Recognize The Reasoned Opinions In The Circuits Below, And Extend *Crawford Fitting* To Disallow The Shifting Of Excess Expert Fees In A Section 1988 Case—Both For Testimonial And Non-testimonial Work

The Hospital argues that *Crawford Fitting*'s reach does not extend to Section 1988, and that expert witness fees assessed under that section should not be subject to a statutory cap. But, as the court below properly stated:

> [*T*]*he broad language of Crawford Fitting strongly suggests that we reach the opposite conclusion.* Although on its facts a Rule 54(d) case, the substance and reasoning in *Crawford Fitting* seems to dictate that, even in the case of a fee shifting statute such as section 1988, a court may not award fees in excess of the statutory maximum of thirty dollars a day unless the fee shifting statute expressly makes such an allowance. *The Court wrote that it "will not lightly infer that Congress has repealed §§ 1920 and 1821, either through rule 54(d) or any other provision not referring explicitly to witness fees."* 482 U.S. at 445, 107 S.Ct. at 2499. Moreover, the Court plainly expressed its disfavor for "[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in sections 1920 and 1821 without plain evidence of congressional intent to supersede that section." *Id.* at 445, 107 S.Ct. at 2499. (Emphasis added).

885 F.2d at 34. Clearly, Congress has not implied, and this Court should not infer, that Section 1988

has "repealed" Sections 1920 and 1821. Instead, this Court should strictly construe the relevant statutes and affirm the decision of the Third Circuit below.

The Hospital also argues that a court should have discretion to award excess expert witness fees, in part, because the legislative history of Section 1988 so contemplates. According to the Petitioners, a Section 1988 Senate Report, S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), refers to *Davis v. County of Los Angeles*, 8 Fair Empl. Prac. Cases (BNA) 244, 246 (C.D. Cal. 1974), a case that had awarded expert fees as part of a prevailing party's "reasonable attorney's fee." Pet. Br. at 10, 20-21. Thus, Petitioner reasons, "the conclusion compelled is that § 1988 authorizes the payment of experts' fees to a prevailing party." *Id.* at 20. But, as the First Circuit made clear in *Denny v. Westfield State College*, 880 F.2d 1465, 1470-71 (1st Cir. 1989):

> [S]uch an oblique reference [in Section 1988's legislative history] is insufficient to meet *Crawford's* standard of explicitness. Furthermore, appellants have taken the *Davis* citation well out of context. The Senate report did not refer at all to expert witnesses' charges; *Davis* was mentioned only to illustrate the amount of fees properly payable to *attorneys*. And in *Davis*, experts' reimbursement was not even a contested issue—the district court allowed plaintiff's request summarily because the defense did not challenge it.

Like the appellants in *Denny*, the Hospital's reference to *Davis* and the Senate Report in this case falls wide of the mark. As fully explained in Respondent's brief, such snippets of so-called "legislative history" certainly do not rise to the level of specificity required by this Court in *Crawford* to overcome Section 1821.

Indeed, this Court's extension of the *Crawford* rule to Section 1988 is fully supported by the decisions of the lower courts—and other circuits in addition to the Third below have interpreted *Crawford Fitting* to disallow the shifting of excess expert fees in a Section 1988 case. In *Sevigny v. Dicksey*, 846 F.2d 953, 959 (4th Cir. 1988), for example, the Fourth Circuit ruled that "§ 1988 does not provide statutory authority for the awarding of compensation for non-legal experts." Similarly, the Eighth Circuit in *Gilbert v. City of Little Rock*, 867 F.2d 1062, 1062-63 (8th Cir.), *cert. denied*, 110 S. Ct. 57 (1989) (*en banc*), affirmed by an equally divided court the order of the district court awarding expert witness fees as expenses under Section 1988 at the statutory rate of thirty dollars a day. *See also Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 1298 (1988) (stating in dicta that under *Crawford Fitting* "[a] prevailing party in a civil rights case is not entitled to tax such fees as costs.")[6]

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[6] *See also Central Delaware Branch of NAACP v. City of Dover*, 123 F.R.D. 85, 94-95 (D. Del. 1988) (awarding expert witness fees under section 1988 at statutory rate of thirty dollars a day); *Knop v. Johnson*, 712 F. Supp. 571 (W.D. Mich. 1989) (*Crawford Fitting* prohibits reimbursement of expert witness fees under § 1988 above thirty dollars per day cap); *Huertas v. East River Housing Corp.*, 674 F. Supp. 440, 456 (S.D.N.Y. 1987).

But, as the Hospital argues, and as the Third Circuit below noted, a number of courts examining the question have concluded that fee awards under section 1988 are not limited to the rate set in section 1821(b). *See Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 30, 1990); *SapaNajin v. Gunter*, 857 F.2d 463, 465 (8th Cir. 1988); and *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983). *Ramos*, however, was decided

And as the Third Circuit properly noted, other circuits have "arrived at the same conclusion with respect to fee-shifting statutes similar to section 1988," 885 F.2d at 34—statutes EEAC member companies also face in employment litigation. In *Denny*, 880 F.2d 1465, for example, the First Circuit held in a Title VII sex discrimination case that the *Crawford Fitting* rule must prevail absent some reasonably explicit indication of Congressional intent that witness fees be shifted without regard to the thirty dollars per day cap. The court in *Denny*, 880 F.2d at 1471, stated:

> Failing the discovery of some tangible, reasonably explicity indication of congressional intent that witness fees be shifted without regard to the $30-per-day cap, the *Crawford* rule must prevail. That is especially true in light of the many statutes that, unlike this one, effectively trump the section 1821 limitation by unambiguously authorizing taxation of witness fees. *See Int'l Woodworkers*, 790 F.2d at 1179 n. 7 (listing 28 laws in which Congress saw fit expressly to include expert witness fees as taxable costs in civil actions); Note, *Expert Witness Fees as Taxable Costs in Federal Courts—The Exceptions and the Rule*, 55 U.Cin.L. Rev. 1207, 1217 n. 63 (1987) (similar) . . . . Given this background, congressional silence on the point takes on larger significance. Congress plainly knew how to factor expert witness fees into the calculus of a cost-shifting statute, but chose not to do so in compiling Title VII.
>
> In this case, our hands are tied. Neither Title VII's text nor the history of its costshifting proviso intimates that Congress intended to include witness payments under the counsel fee rubric.

Similarly, in *Gottlieb v. Tulane University*, 809 F.2d 278, 284 (5th Cir. 1987), the Fifth Circuit recognized *Crawford Fitting*'s companion case, *Woodworkers*, to stand for the proposition that expert witness fees are limited to $30 by Section 1821. The Fifth Circuit in *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1735 (1988), also found Section 1821 applicable to the fee-shifting provision of the Voting Rights Act. And in *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1575 (11th Cir.), *cert. denied*, 109 S.Ct. 378 (1988), the Eleventh Circuit found Section 1821 applicable to the fee-shifting provision of the Equal Pay Act, because "the broad language in *Crawford Fitting* does not permit a distinction based upon whether or not the award is made under a fee-shifting statute."[7] Ac-

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before *Crawford Fitting*, and the Eighth Circuit's ruling in *SapaNajin* is called into question by its later decision in *Gilbert v. Little Rock, supra.*

For the reasons explained in Respondent's brief, other cases, such as *Friedrich*, and various district court decisions permitting excess witness fees, are simply wrongly decided, and should be overturned by this Court. *See, e.g., Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393, 1403 (E.D. Pa. 1988); *Hillburn v. Commissioner, Conn. Dep't of Income Maintenance*, 683 F. Supp. 23 27 (D. Conn. 1987), *aff'd*, 847 F.2d 835 (2d Cir. 1988); *United States v. Yonkers Bd. of Educ.*, 118 F.R.D. 326, 330 (S.D.N.Y. 1987).

[7] In its brief at page 22 n.21, Petitioner cites a number of Title VII cases for the proposition that "federal courts have continued to rule that expert witness fees may be awarded to prevailing parties" under statutes similar to Section 1988. All of these Title VII cases, however, *predate Crawford Fitting* and, therefore, mislead this Court in its inquiry.

Indeed, many other pre-*Crawford Fitting* Title VII cases *deny* expert fees. More importantly, as noted, the reasoned Title VII cases decided after *Crawford Fitting* understand-

cordingly, this Court should recognize the reasoning in these cases and apply it herein.

Finally, in extending the *Crawford Fitting* rule to Section 1988, this Court should apply the $30 cap to *nontestimonial* expert fees as well as the time actually spent testifying during trial. As a Texas district court recently stated in construing *Crawford Fitting*'s companion case, *Woodworkers*:

> The distinction between an expert's in-court testimony and out-of-court preparation does not avail the plaintiffs, because it is irrelevant. The *Woodworkers (en banc)* holding applies not only to the expert witness' time and efforts on the stand, but to all of his work. The rule reaches "*services* . . . for the statistical aspects of the case." 790 F.2d at 1176 (emphasis [by court]); *see also Woodworkers* panel decision, 752 F.2d at 164. It is not limited to expert *testimony*. Indeed, the *en banc Woodworkers* court states that is impermissible to tax as costs any expenses not specifically authorized by 28 U.S.C. §§ 1920 and 1821. *See Woodworkers en banc* decision, 790 F.2d at 1179-80.

Shipes v. Trinity Industries, Inc., 685 F. Supp. 612, 614 (E.D. Tex. 1987). Congress knew what it was doing when it enacted Section 1821, and deference should be afforded to that decision. Accordingly, this Court should affirm the decision of the Third Circuit below.

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ably deny the shifting of expert fees. *See, e.g., Shipes v. Trinity Industries, Inc.*, 685 F. Supp. 612, 614 (E.D. Tex. 1987).

II. AN EXTENSION OF *CRAWFORD FITTING* WILL NOT CONFLICT WITH THIS COURT'S SHIFTING OF PARALEGAL FEES IN *MISSOURI v. JENKINS*

As in the instant case, the prevailing party in *Denny v. Westfield State College*, 880 F.2d at 1469, was faced with the daunting challenge of distinguishing the plain language of the fee shifting statutes and their legislative history, yet still managed to "offer a salmagundi of reasons why the *Crawford* rule should not be be extended."

Among the "salmagundi of reasons" for not following *Crawford Fitting*, the Hospital herein cites this Court's recent ruling in *Missouri v. Jenkins*, 109 S.Ct. 2463 (1989), that attorney's fees under Section 1988 can include fees for paralegals and other law firm employees who assist the attorney in preparing the case. Indeed, in its brief at page 27, the Hospital goes so far as to say that this Court rejected the "plain meaning" rule in construing Section 1988 in *Jenkins*, and that it should do the same herein.

Clearly, this Court did not abrogate the "plain meaning" rule, and *Jenkins* obviously is not dispositive of this case. The true distinction between *Jenkins* and the case herein, of course, is that paralegal time and other law firm litigation expenses "contribute[] to the work product for which an attorney bills [the] client." 109 S.Ct. at 2470. Paralegals are similar to secretaries, messengers and librarians in the sense that they work directly for the attorney. Witnesses, however, are used to provide evidence aside from attorney work product.

Moreover, paralegal fees are not expressly regulated by statute, whereas witness fees are expressly

governed by Section 1821. Although courts may have discretion with regard to fees not regulated by statute, this Court, as stated in *Crawford Fitting*, will not "lightly infer" a repeal of limitations on costs such as expert witness fees specifically enumerated in Section 1920 or 1821. 107 S.Ct. at 2499.

The court below properly recognized this distinction. It stated:

> We believe that the recent decision of the Court in *Missouri v. Jenkins* . . . in no way alters the ruling of the Court in *Crawford*. Unlike *Crawford*, which dealt with witness fees statutorily fixed by Congress as part of the costs, the Court in *Jenkins* dealt with a comparatively new phenomenon in the legal world, the enhancement of attorney's fees by including the fees for services of paralegals and law clerks. *Their fees, however, are not regulated by statute as are witness fees. In fact, Missouri, against whom the fees were taxed, conceded "that compensation for the cost of these personnel should be included in the fee award."* *Id.* at ——, 109 S.Ct. at 2469. Missouri's argument was that section 1988 did not authorize billing paralegals at market rates, but only at their cost to the attorneys hiring them; charging market rates produced a windfall for the attorney.

885 F.2d at 34. (Emphasis added, cite omitted).

Accordingly, it is clear that this Court's extension of *Crawford Fitting* would not conflict with its decision in *Missouri v. Jenkins*. Such an extension, rather, would be consistent with prior rulings.

III. SIGNIFICANT POLICY REASONS SUPPORT AN EXTENSION OF *CRAWFORD FITTING*, AND MILITATE IN FAVOR OF A CONSISTENT INTERPRETATION AMONG THE VARIOUS FEE SHIFTING STATUTES

Several policies support this Court's extension of *Crawford Fitting*, and militate in favor of limiting the shifting of expert fees. One is simply to have some type of restraint upon the amount of fees and costs that a court can tax a losing party. In fact, this Court in *Crawford Fitting* recognized that in enacting Sections 1920 and 1821, Congress "means to impose rigid controls on cost shifting in federal courts." 107 S.Ct. at 2499. There must be no "roving authority to the Judiciary" to shift fees "whenever the courts might deem them warranted." *Alyeska*, 421 U.S. at 260, cited in *Crawford Fitting* at 2499. Indeed, the First Circuit in *Denny* recognized this policy factor as significant in denying the shifting of expert fees under Title VII.[8] 880 F.2d at 1467.

Such a limitation is especially important for EEAC's member companies in employment and civil rights litigation. In such litigation, plaintiffs often attempt to prove discrimination with expensive statistical analyses. If this Court does not give proper deference to the Congressional cap on cost shifting, em-

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[8] 42 U.S.C. § 2000e-5 provides:

> (k) Attorney's fee; liability of Commission and United States for costs
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

ployers will be unfairly encouraged to settle—even nonmeritorious claims—where it appears that a court could shift expert fees.

More importantly, this Court should construe Section 1988 so that there is some consistency among the various statutes that permit a prevailing party to recover fees and costs. As noted, even though this case involves Section 1988 and medicaid issues, it is of concern to EEAC members since Section 1988 also covers fees awarded under Section 1981, the Rehabilitation Act, and Title VI of the Civil Rights Act. In addition, Title VII, the ADEA and the Equal Pay Act all contain similar language. It is absolutely crucial that this Court construe Section 1821 for 1988 purposes the same way it has construed Section 1821 for purposes of Fed. R. Civ. P. 54(d). *See Independent Federation of Flight Attendants v. Zipes*, 109 S.Ct. 2732, 2735 n.2 (1989) (Section 706(k) of Title VII and Section 1988 "are to be interpreted alike").

As this Court has recognized in *Zipes* and other cases, consistency in interpretation is a laudable goal —particularly among the discrimination and civil rights statutes. Indeed, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this Court took great care to interpret the term "willful" for purposes of assessing damages under the ADEA and the FLSA in a manner that is "consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes." *Id.* at 126. And in *McLaughlin v. Richland Shoe*, 108 S.Ct. 1677 (1988), this Court went on to interpret the term "willful" as used in the ADEA's statute of limitations so that it is consistent with the way the term was construed in *Thurston*. Even in *Crawford Fitting*, this Court was careful to ensure that its holding was consistent with *Alyeska* and other constructions of the relevant attorney's fees provisions. 107 S.Ct. at 2498-99.

Accordingly, this Court should recognize the strong policy concerns and extend *Crawford Fitting* to Section 1988.

CONCLUSION

For the foregoing reasons, the amicus respectfully submits that the Third Circuit's decision should be affirmed.

Respectfully submitted,

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